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TOWARDS THE SECOND FOUNDING OF FEDERAL SENTENCING

DAWINDER S. SIDHU*

In 1987, the Nation's first attempt to standardize federal sentencing came in the form of the United States Sentencing Guidelines. Following United States v. Booker, however, the Guidelines project began bending, and today it is now all but broken, besieged by complexity, undue severity, and the very disparities that it was designed to limit. This Article responds to this crisis by establishing the blueprint for an alternative federal sentencing model. Under this proposal, sentencing determinations would be based on statutory grades and unweighted aggravating and mitigating factors. This approach brings coherence to the purposes of punishment and, by deemphasizing quantitative determinations, promises increased judicial discretion and greater opportunities for counsel to influence sentencing. To demonstrate this system's simplicity and workability, this Article applies the system to actual federal cases.

I. INTRODUCTION

Sentencing is one of the most solemn and significant acts exercised by a sovereign, as it determines, on behalf of the constituent people, whether and how the liberty of another is to be restricted.¹ A society of laws must

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1. See Norval Morris, *Towards Principled Sentencing*, 37 MD. L. REV. 267, 268, 275 (1977) (“The criminal justice system controls the largest power the government exercises over its citizens and is of central constitutional importance [S]entencing involves a heavy responsibility and raises issues of difficulty”); Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952). “[P]enal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched

impose punishment: There must be some consequence if an individual steps beyond the bounds of the law,² and human nature is such that individuals invariably will cross the line.³

For most of American history, judges possessed almost unlimited discretion to determine sentences, provided only that their sentences fell within established (and generally wide) statutory limits.⁴ A byproduct of this generous discretion was sentencing disparities.⁵ Concerned that similarly situated offenders were not receiving similar sentences, Congress sought to introduce some appreciable level of uniformity into federal sentencing.⁶ These reform efforts culminated in the Sentencing Reform Act of 1984 (“SRA”),⁷ which created the United States Sentencing Commission (“Commission”) and charged this new agency with establishing sentencing

only by its power to destroy. . . . Nowhere in the entire legal field is more at stake for the community or for the individual.” *Id.*

Federal judges, including the Chief Justice of the United States, have acknowledged the stakes and the onerous nature of sentencing. *See, e.g.*, CHIEF JUSTICE OF THE UNITED STATES, 2016 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2016), <https://www.supremecourt.gov/publicinfo/year-end/2016year-endreport.pdf> (“If the trial results in conviction, the judge faces the somber task of sentencing. Most district judges agree that sentencing is their most difficult duty.”); Mark W. Bennett, *Hard Time: Reflections on Visiting Federal Inmates*, 94 JUDICATURE 304, 304 (2011) (“I have always had a hard time with sentencing. It is an awesome responsibility to take one’s liberty away.”); Jack B. Weinstein, *Does Religion Have a Role in Criminal Sentencing?*, 23 TOURO L. REV. 539, 539 (2007) (“Sentencing, that is to say punishment, is perhaps the most difficult task of a trial court judge.”).

2. THE FEDERALIST NO. 15, at 72 (Alexander Hamilton) (George W. Casey & James McClellan eds., 2001). (“It is essential to the idea of a law, that it be attended with . . . a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws, will in fact amount to nothing more than advice or recommendation.”).

3. *See* THE FEDERALIST NO. 51, at 269 (James Madison) (George W. Casey & James McClellan eds., 2001) (“[W]hat is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary.”).

4. *See* *Wasman v. United States*, 468 U.S. 559, 563 (1984) (“It is now well established that a judge . . . is to be accorded very wide discretion in determining an appropriate sentence.”); *Dorszynski v. United States*, 418 U.S. 424, 431 (1974) (“[O]nce it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.”).

5. *See* S. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 [hereinafter SRA Legislative History] (“[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances.”); *see id.* (attributing these disparities to “unfettered discretion” and the absence of “statutory guidance”).

6. *See* *United States v. Booker*, 543 U.S. 220, 253 (2005) (“Congress’ basic goal in passing the Sentencing [Reform] Act was to move the sentencing system in the direction of increased uniformity.”).

7. 18 U.S.C. §§ 3551–3559 (2012); 28 U.S.C. §§ 991–998 (2008).

guidelines applicable to all federal judges.⁸ In 1987, the Commission promulgated the first United States Guidelines Manual.⁹

Thirty years later, the Guidelines' structure—not just individual guideline provisions—is breaking down. Judges are increasingly departing from the Guidelines.¹⁰ As compliance with the Guidelines decreases, so too does the ability of the Guidelines to achieve its primary aim of curbing sentencing disparities.¹¹ Moreover, the Guidelines are increasingly complex¹² and severe.¹³ They reduce the sobering responsibility of sentencing to quantitative calculations,¹⁴ and appellate review is effectively an exercise in checking the district court's math.¹⁵ The Guidelines also failed to coordinate the competing purposes of punishment,¹⁶ meaning specific guideline provisions are not springing forth from any coherent principled source.¹⁷ Given these fundamental issues, the solution lies not in incremental repairs to the Guidelines, but in its wholesale replacement. If 1987 marked the first founding of federal criminal sentencing, a second founding is in order.

This Article proposes a new approach to sentencing in the federal courts. This guidelines system may be summarized as follows:

A judge will first identify the statutory grade of the offense of conviction, as the statutory grade captures the relative seriousness of the offense. Each grade has a corresponding sentencing range, established by Congress in 18 U.S.C. § 3559; a judge next will identify any statutory minimums or maximums that apply to the offense of conviction. These offense-specific statutory minimums and/or statutory maximums shall adjust the sentencing range otherwise set forth in 18 U.S.C. § 3559;

The starting point for a sentence shall be the midpoint of the applicable statutory range (i.e., the sentencing range governing the grade of the offense of conviction, adjusted by any offense-specific statutory minimums and/or statutory maximums);

8. 28 U.S.C. § 994 (2008).

9. U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 1987) [hereinafter 1987 U.S.S.G.]. Please note that the Author will refer to the U.S. Sentencing Guidelines Manual generally as “the Guidelines,” and will refer to specific Guidelines from different years as “[year] U.S.S.G.”

10. *See infra* Part III.E.

11. 28 U.S.C. § 991(b)(1)(B) (“The purposes of the United States Sentencing Commission are to . . . avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . .”).

12. *See infra* Part III.B.

13. *See infra* Part III.D.

14. *See infra* Part III.C.

15. *See infra* Part III.F.

16. *See* 18 U.S.C. § 3553(a) (2012).

17. *See infra* Part III.A.

A judge shall impose, for typical cases, a sentence within 25% of this midpoint;

Upward or downward adjustments will be made based on a closed universe of twenty enumerated aggravating and mitigating factors. These factors are drawn from the text and legislative history of the SRA. No fixed numerical scores will be assigned to these factors, allowing the prosecutor, defense counsel, and the judge to consider the applicability and qualitative weight of the factors;

All aggravating factors must be proven to a jury beyond a reasonable doubt;

Meaningful appellate review will follow if a judge imposes a sentence outside of this range, employs a non-enumerated factor, or miscalculates the applicable range;

The form of punishment shall be based on evidence-based rehabilitation. As the sentence length is predicated on the relative seriousness of the offense, the length of punishment shall be justified on retributive considerations. To incentivize participation in rehabilitative programming and reduce recidivism, an offender shall not be released until they are determined to be capable of living crime-free in society. In this respect, parole will be returned to the federal system. Any continued sentence beyond what is supported by retributive considerations shall be justified on the need to incapacitate the offender. Truth in sentencing will be furthered by knowledge that an offender will serve a certain, minimum length of time;

First-time offenders who do not commit a violent or otherwise serious offense will not be sentenced to a term of incarceration, and conversely, incarceration is most appropriate for offenders who commit violent or otherwise serious offenses; and

The Commission shall study the sentencing practices of judges and modify the applicable midpoint for offenses in light of this data. The Commission also may modify the applicable midpoint based on broader efforts to give greater coherence to the federal criminal code.

To demonstrate the workability of this system, this Article shows how the system would apply to a series of real federal cases.

The Commission itself is debating structural changes to the Guidelines and, in doing so, has acknowledged the unsustainability of the status quo. This Article offers, in parallel to that agency's structural reform efforts, an alternative federal sentencing regime. The hope is that this system will be considered, side-by-side with the Commission's eventual proposal, such that Congress and the greater sentencing community can have a deeper

source of ideas from which to draw. These improved guidelines may be a meaningful part of broader criminal justice reform.

I recognize that elements of the system described below may be controversial and even non-starters for some. But the movement in furtherance of a more sensible and simplified guidelines regime must begin with the presentation and consideration of different ideas. As Justice Stephen G. Breyer noted with respect to the preparation and publication of the first draft of the guidelines manual, the draft served as a “vehicle for people to comment” and members of the sentencing community invariably “would comment negatively.”¹⁸ The draft nonetheless was part of the process that ultimately led *towards* a final manual. This Article is submitted to the sentencing community in the same spirit, with the same objective.

This Article proceeds as follows. Part II traces the development of federal sentencing, which culminated in the development of the Guidelines. Part III identifies critical problems with the Guidelines, including diminishing compliance, which suggest that the present system cannot be salvaged. Part IV responds to this crisis by advancing a new federal sentencing system, characterized by the aforementioned principles. Part V acknowledges limitations of this system. Part VI shows how the system would play out in practice.

II. THE FIRST FOUNDING

This Part describes the pre-Guidelines concerns that led to calls for a federal sentencing agency and federal guidelines, how Congress responded to these demands for federal sentencing reform, and the basic aspects of the Guidelines system.

A. *Pre-Guidelines Sentencing*

Historically, sentencing in the United States was an uncoordinated enterprise. At the country’s inception, sentencing was driven by principles of deterrence, with retribution playing a role in only the most heinous of crimes.¹⁹ In the nineteenth century, rehabilitation emerged as the primary rationale for punishment,²⁰ and the rehabilitative approach continued to

18. Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985–1987*, 45 HOFSTRA L. REV. 1167, 1231 (2017) (quoting Interview by Gen. Accounting Office with Stephen G. Breyer, Comm’r, U.S. Sentencing Comm’n, at 14 (May 12, 1987) (on file with authors)).

19. See David J. Rothman, *Perfecting the Prison: United States, 1789–1865*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 111, 111–13 (Norval Morris & David J. Rothman eds., 1995).

20. See *id.* at 116–17.

dominate American sentencing theory until modern times.²¹ In a rehabilitation-centric sentencing system, judges possessed virtually unlimited discretion to impose a sentence tailored to reform the particular offender.²²

Such individualized sentencing maximized judicial discretion, but came at the cost of sentencing disparities throughout the country and even within the same districts.²³ The seminal 1974 Second Circuit Sentencing Study demonstrated this point. In the study, federal judges within the Second Circuit were asked to impose sentences in twenty hypothetical cases, with full discretion.²⁴ “[T]he results diverged dramatically,” Justice Breyer recounted.²⁵ In the first of twenty cases, for example, one judge would have imposed a sentence of three years imprisonment, while another a sentence of twenty years.²⁶ These disparities confirmed that offenders with *like* backgrounds who committed *like* offenses were not being given *like* sentences.²⁷ The study helped bolster the case for federal sentencing reform.²⁸

In a series of speeches and writings, Judge Marvin Frankel, the “father of sentencing reform,”²⁹ brought critical attention to sentencing disparities.³⁰ He highlighted, for example, “compelling evidence that widely unequal sentences are imposed every day in great numbers for crimes and crim-

21. *See* *Williams v. New York*, 337 U.S. 241, 248 (1949) (“Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.”).

22. *See, e.g., id.* at 245 (stating that “New York judges are given a broad discretion to decide the type and extent of punishment for convicted defendants”).

23. The term *disparities*, here, primarily means like offenders committing like offenses and receiving different sentences. In addition, the term *disparities* also encompasses discriminatory sentencing practices. *See* William W. Wilkins, Jr. et al., *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 CRIM. L.F. 355, 359–62 (1991) (summarizing findings of studies on the forms and extent of racial discrimination in sentencing); *see also* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 60–61 (1998) (explaining sentences for white collar and drug offenses perceived to be too lenient).

24. FED. JUD. CTR., THE SECOND CIRCUIT SENTENCING STUDY: A REPORT TO THE JUDGES OF THE SECOND CIRCUIT 1–3 (1974), [http://www.fjc.gov/public/pdf.nsf/lookup/2dcrstdy.pdf/\\$file/2dcrstdy.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/2dcrstdy.pdf/$file/2dcrstdy.pdf) [hereinafter SECOND CIRCUIT SENTENCING STUDY].

25. Justice Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 FED. SENT’G REP. 180, 180 (1999).

26. SECOND CIRCUIT SENTENCING STUDY, *supra* note 24, at 6–7 tbl.1.

27. *See id.*

28. *See* SRA Legislative History, *supra* note 5, at 41–44.

29. 128 CONG. REC. 26,503 (1982) (statement of Sen. Edward Kennedy).

30. *See, e.g.,* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973) [hereinafter FRANKEL, CRIMINAL SENTENCES]; Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972) [hereinafter Frankel, *Lawlessness in Sentencing*]; Jon O. Newman, *A Better Way to Sentence Criminals*, 63 A.B.A. J. 1562, 1563 (1977) (“Most of today’s criticisms hold that there is too much disparity in sentencing I agree . . . that there is excessive disparity.”).

inals not essentially distinguishable from each other.”³¹ In response, Judge Frankel proposed a uniform federal sentencing system and a “National Commission” to develop and monitor that system.³²

B. *The Federal Sentencing Guidelines*

In 1984, Congress ultimately responded to the call for greater sentencing uniformity by passing the SRA.³³ The SRA set forth a number of general rules on sentencing and created an independent agency within the federal judiciary, the United States Sentencing Commission,³⁴ tasking it with translating the SRA’s many directives into specific sentencing policies that would be binding on all federal judges.³⁵ While sentencing involves a number of policy choices, the dominant principle of the SRA was that like offenses committed by offenders with like criminal histories should receive like sentences.³⁶

The Guidelines project was the country’s first ever attempt to standardize federal sentencing policy. The introduction of these Guidelines has been likened to a revolution in American criminal law and federal sentencing.³⁷ For example, at the confirmation hearing for prospective Commissioners, the chair of the Senate Judiciary Committee said the nominees would be taking on the “role of founders.”³⁸

31. FRANKEL, *CRIMINAL SENTENCES*, *supra* note 30, at 8.

32. Frankel, *Lawlessness in Sentencing*, *supra* note 30, at 51.

33. 18 U.S.C. §§ 3551–3559 (2012). For Title II of the Comprehensive Crime Control Act of 1984, see 28 U.S.C. §§ 991–998 (2012). The definitive overview of the legislative attempts to deal with sentencing disparities is Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

34. See 28 U.S.C. § 991 (establishing the Commission).

35. *Id.* § 991(b) (enumerating the purposes of the Commission); see also *Mistretta v. United States*, 488 U.S. 361, 369–70 (1989) (describing the responsibilities of the Commission).

36. See SRA Legislative History, *supra* note 5, at 41 (decrying the “disparity in the sentences which courts impose on similarly situated defendants”); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and the United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295 (1993) (“The first and foremost goal of the sentencing reform effort was to alleviate the perceived problem of federal criminal sentencing disparity.”).

37. As one U.S. Circuit Judge noted, the Guidelines are “the greatest change in federal sentencing since the founding of the republic.” Hon. Edward R. Becker, *Insuring Reliable Fact Finding in Guidelines Sentencing: Must the Guarantees of the Confrontation and Due Process Clauses Be Applied?*, 22 CAP. U. L. REV. 1, 1 (1993); see also DEP’T OF JUSTICE, REMARKS OF THE HON. EDWIN MEESE III, ATTORNEY GEN. OF THE UNITED STATES ON THE SENTENCING COMMISSION’S GUIDELINES BEFORE THE AMERICAN LAW INSTITUTE 11 (1987) (“These guidelines mark a decisive turning point in the history of the federal criminal justice system.”).

38. *Confirmation Hearings on Federal Appointments: Hearing on Michael K. Block, Ilene H. Nagel, and Paul H. Robinson Before the S. Comm. on the Judiciary*, 95th Cong. 306 (1985) (statement of Sen. Charles Mathias).

In 1987, the Commission fulfilled its initial mandate, promulgating the United States Sentencing Guidelines Manual.³⁹ Since then, the Commission has, as required by statute, adjusted the Guidelines through an amendment process that ends with Congress's express approval or acquiescence.⁴⁰ The essential structure has remained the same: to find the appropriate sentence, a judge calculates the offense conduct score (made up of a base offense of conviction score and scores for aspects of the specific offense conduct), calculates an offender's criminal history,⁴¹ and then finds the intersection of these inputs on a 258-box grid containing sentencing ranges.⁴²

In 2005, the Supreme Court held, in *United States v. Booker*,⁴³ that a mandatory Guidelines system was unconstitutional.⁴⁴ As the remedy, the Court rendered the Guidelines advisory.⁴⁵ The Court has made clear that the Guidelines are still to be the "starting point and the initial benchmark" for a judge's determination of a federal sentence.⁴⁶ Because the Guidelines are the first step in the sentencing process, the Court repeatedly has acknowledged that a judge's ultimate sentencing decision will be "anchored" to the initial Guidelines calculation.⁴⁷ Though Guidelines compliance waned after *Booker*,⁴⁸ the Guidelines continue in an advisory world to occupy a "central role" in federal sentencing.⁴⁹

39. 1987 U.S.S.G., *supra* note 9.

40. See 28 U.S.C. § 994(p) (2008) (describing the Guidelines amendment process).

41. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(7) (U.S. SENTENCING COMM'N 2016) [hereinafter 2016 U.S.S.G.] (stating that the Guidelines range is the product of §§ 1B1.1(a)(1)–(5), which relate to the offender's offense conduct, and § 1B1.1(a)(6), which relates to the offender's criminal history). The Guidelines also provide for "departures" from the Guidelines, *id.* § 1B1.1(b), and for the purposes of sentencing in 18 U.S.C. § 3553(a) to be considered. *Id.* § 1B1.1(c); see also *Peugh v. United States*, 133 S. Ct. 2072, 2079 (2013) (noting that the Guidelines are "a system under which a set of inputs specific to a given case (the particular characteristics of the offense and offender) yielded a predetermined output (a range of months within which the defendant could be sentenced)").

42. For the Sentencing Table, see 2016 U.S.S.G., *supra* note 41, § 5A.

43. 543 U.S. 220 (2005).

44. *Id.* at 280.

45. *Id.* at 245.

46. *Gall v. United States*, 552 U.S. 38, 49 (2007).

47. See *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016); *Peugh v. United States*, 133 S. Ct. 2072, 2083 (2013).

48. See *infra* notes 91–95 and accompanying text.

49. *Molina-Martinez*, 136 S. Ct. at 1341; see also *United States v. Ingram*, 721 F.3d 35, 40 (2d Cir. 2013) (Calabresi, J., concurring) ("[T]he starting, guidelines-departure point matters [because when individuals] are given an initial numerical reference . . . they tend (perhaps unwittingly) to 'anchor' their subsequent judgments . . ."); *United States v. Diaz-Ibarra*, 522 F.3d 343, 347 (4th Cir. 2008) ("An error in the calculation of the applicable Guidelines range . . . infects all that follows at the sentencing proceeding, including the ultimate sentence chosen by the district court . . ."); Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT'G REP. 6, 8 (2013) ("[As] the very first thing a judge is still required to do at sentencing is to

III. THE CRISIS IN FEDERAL SENTENCING

The Guidelines, however responsive to discomfort with sentencing disparities and however influential in current sentencing decisions, are breaking down. Several problems with the Guidelines support this conclusion: the Guidelines do not coordinate the principled reasons for punishment and instead rely on averages as the foundation for penalty outcomes; the Guidelines are growing in complexity, undermining their comprehension and ease of administration; the Guidelines reduce sentencing to a math problem, diminishing the human and qualitative aspects of sentencing and enhancing the leverage of prosecutors by affording them a quantifiable baseline for plea negotiations; the Guidelines contribute to severe federal sentences, especially in the context of drug offenses and especially by equating quantity with culpability, which have particularly detrimental effects on the poor and people of color; the Guidelines have been met with decreased compliance, in part due to the fact that they were built to be mandatory yet are operating in an advisory world, meaning the Guidelines are not adequately furthering their primary goal of curbing sentencing disparities; and the Guidelines do not promote meaningful appellate review.

A. *The Guidelines Lack Philosophical Coherence*

Congress required the Commission to ensure that the Guidelines reflect the four purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation.⁵⁰ The original Commission responded to this charge by deciding to develop two drafts—one based on retributive or “just deserts” considerations and a second based on utilitarian or “crime control” considerations—which would then be melded into a “multipurpose amalgam.”⁵¹ The “just deserts” draft was not well-received and a “crime control” draft was not developed at all.⁵² Running out of time to meet the statutory deadline of April 13, 1987,⁵³ the Commission pulled the plug on the multipurpose project. Instead, the Commission adopted an “empirical” approach in which the past practices, or the average sentences in the pre-Guidelines era, became the touchstone for the Guidelines.⁵⁴ The Commis-

calculate the Guidelines range, [the calculation] creates a kind of psychological presumption from which most judges are hesitant to deviate too far.”)

50. 18 U.S.C. § 3553(a)(2) (2012).

51. See Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 918–19 (1990).

52. See *id.* at 918–20.

53. See 1987 U.S.S.G., *supra* note 9, at 1.1.

54. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 17 (1988).

Faced, on the one hand, with those who advocated “just deserts” but could not produce a convincing, objective way to rank criminal behavior in detail, and, on the other

sion presumed that the average sentences embodied judges' varying views of the purposes of punishment.⁵⁵ The Commission did not, however, clarify or explain how the purposes of punishment were to be effectuated in the Guidelines. In other words, the Guidelines lack a principled basis, as the dissenting member of the original Commission and others have recognized.⁵⁶

A recent development in federal sentencing underscores the disinterest in a philosophical basis for the Guidelines, and the importance of harmonizing the purposes of punishment. In 2017, the Attorney General issued a memorandum, explaining the Department of Justice's policy with respect to charging decisions.⁵⁷ The Attorney General instructed his prosecutors to charge defendants with the "most serious, readily provable offense," defining "serious" as the charge that carries the "most substantial . . . sentence."⁵⁸ The memorandum triggered a flurry of criticism, but the public commentary completely overlooked the second piece of the memorandum: it also instructs prosecutors to ultimately "seek a reasonable sentence under the fac-

hand, with those who advocated "deterrence" but had no convincing empirical data linking detailed and small variations in punishment to prevention of crime, the Commission reached an important compromise. It decided to base the Guidelines primarily upon typical, or average, actual past practice.

Id.; see also Nagel, *supra* note 51, at 930–31. Past practice was used as a guide for the Guidelines' sentencing levels, except for drug and white-collar offenses; they were seen as too lenient and thus were enhanced under the Guidelines. See STITH & CABRANES, *supra* note 23, at 60–61.

55. See Dissenting View of Commissioner Paul H. Robinson on the Promulgation of Sentencing Guidelines by the United States Sentencing Commission, 52 Fed. Reg. 18,121, 18,122 (May 13, 1987) [hereinafter Robinson Dissenting] (explaining that two judges may sentence for different reasons, "[b]ut by adopting no policy, and relying upon a mathematical average of sentences, the guidelines provide 'bastardized' sentences that will serve neither of the two purposes."); see also INSLAW, INC. & YANKELOVICH, SKELLY & WHITE, INC., FEDERAL SENTENCING: TOWARD A MORE EXPLICIT POLICY OF CRIMINAL SANCTIONS III-2, III-4, III-5 to III-7 (1981) (providing a survey revealing judges' differences of opinion as to sentencing goals); Edward M. Kennedy, *Foreword* to PIERCE O'DONNELL ET AL., TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM vii, viii (1977) ("One judge may sentence in order to rehabilitate, another to deter the offender or the potential offender from committing a similar crime, a third to incapacitate, while a fourth may sentence simply to 'punish.'").

56. See Robinson Dissenting, *supra* note 55, at 18,123 ("Past practice cannot be properly or legally used, as the guidelines use it, as a 'theory' or 'principle' for guideline drafting."); Jeffrey S. Parker & Michael K. Block, *The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers*, 9 GEO. MASON L. REV. 1001, 1012 (2001) ("While there is much to be said for the empirical approach of the initial guidelines, ultimately such an approach cannot substitute fully for the development of sound sentencing principles, if sentencing reform is to progress toward its ultimate goal of creating a measurably more effective system of criminal punishment."); see also Editorial, *Rational Sentencing*, N.Y. TIMES, May 29, 1976, at A14 ("Any new sentencing program which does not address itself to those uncertainties is apt ultimately to lapse into confusion born of the absence of an intellectual core.").

57. OFFICE OF THE ATTORNEY GEN., DEP'T OF JUSTICE, MEMORANDUM FOR ALL FEDERAL PROSECUTORS (May 10, 2017), <http://www.justice.gov/opa/press-release/file/965896/download>.

58. *Id.* at 1.

tors in 18 U.S.C. § 3553.”⁵⁹ The four purposes codified in 18 U.S.C. § 3553 are the backstop for a prosecutor’s charging decisions under the memorandum and the touchstone of a federal judge’s sentencing determinations. But the purposes were not even addressed in the memorandum, let alone melded together in any coherent way.

B. The Guidelines Are Increasingly Complex

The Guidelines are increasingly complex⁶⁰ if not unworkable.⁶¹ Even the Supreme Court⁶² and some Commissioners⁶³ have acknowledged the undue complexity of the Guidelines. In 1996, the Commission itself attempted to craft a “simplified” version of the Guidelines, effectively admitting that the Guidelines are too complex.⁶⁴ Twenty years later, in 2016, the Commission released its priorities for action, which included examining the “overall structure of the guidelines,” another concession that the Guidelines are too cumbersome.⁶⁵ Literally, this is a growing problem: easy application of the Manual becomes a more distant prospect as more material is added to it.⁶⁶

59. *Id.*

60. See William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 309 (2011) (noting the “undue complexity and rigidity of the guidelines system”); see also *Gilbert v. United States*, 640 F.3d 1293, 1309 (11th Cir. 2011) (“Sentencing guidelines provisions are many and complex”); *United States v. Mills*, 485 F.3d 219, 223 (4th Cir. 2007) (“The Sentencing Guidelines are a veritable maze of interlocking sections and statutory cross-references.”); *United States v. Williams*, 431 F.3d 767, 773 (11th Cir. 2005) (Carnes, J., concurring) (referring to “the Sentencing Guidelines, some provisions of which are mind-numbingly complex and others of which are just mind-numbing”).

61. See *United States v. Spencer*, 700 F.3d 317, 326 (8th Cir. 2012) (Bright, J., dissenting) (“[M]any of the federal sentencing guidelines have proven unworkable.”).

62. See *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342 (2016) (“The Guidelines are complex”); see also *Blakely v. Washington*, 542 U.S. 296, 346–47 (2004) (Breyer, J., dissenting) (characterizing certain Guidelines as “highly complex”). This view of the Guidelines is quite weighty, if not ironic, as then-Judge Breyer was a member of the inaugural Sentencing Commission. See *Former Commissioner Information*, U.S. SENTENCING COMM’N, <http://www.ussc.gov/about/commissioners/former-commissioner-information> (last visited Feb. 12, 2018).

63. See William H. Pryor, Jr., *Returning to Marvin Frankel’s First Principles in Federal Sentencing*, 29 FED. SENT’G REP. 95 (Dec. 2016–Feb. 2017) [hereinafter Judge Pryor’s Remarks]; Remarks of Judge William Pryor at Scalia Law School, George Mason University, 29 FED. SENT’G REP. 278, 278 (June 2017) [hereinafter Judge Pryor’s Response] (“[W]e need simpler guidelines.” (emphasis omitted)); Sessions, *supra* note 60, at 342–43.

64. See *Simplification Draft Paper*, U.S. SENTENCING COMM’N, <http://www.ussc.gov/research-and-publications/working-group-reports/simplification-draft-paper> (last visited Feb. 12, 2018) (acknowledging the complexity in the current Guidelines).

65. Proposed Priorities for Amendment Cycle, 81 Fed. Reg. 37,241 (proposed June 9, 2016).

66. See Judge Pryor’s Remarks, *supra* note 63, at 95–97 (noting the Guidelines have “grown in complexity” and observing the current manual is double the size of the original); R. Barry

C. *The Guidelines Are Unduly Quantitative*

The Guidelines have withdrawn judicial discretion in service of a cold point-system. The solemn act of sentencing another human has been reduced, almost entirely, to arithmetic.⁶⁷ Judge Frankel declared, “It is our duty to see that the force of the state, when it is brought to bear through the sentences of our courts, is exerted with the maximum we can muster of rational thought, humanity, and compassion.”⁶⁸ The Guidelines’ reliance on numbers offers the appearance of that rationality.⁶⁹ Other judges’ dissatisfaction with the Guidelines’ reliance on numbers is exemplified by the phrase “grid and bear it.”⁷⁰

The sufficiency of math alone in sentencing is such that if a judge sentences within the Guidelines range, they need not provide any explanation or utter a single clarifying word—to the defendant, to counsel, to the victims or their families, to the appeals court judges, or to the people on whose behalf a sentence is imposed—as to why they selected a particular sentence.⁷¹ Because a within-Guidelines sentence is presumed to be reasonable,⁷² a district judge need only allow the numbers to speak for themselves.

Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL’Y & L. 739, 764 (2001) (identifying 631 amendments to the Guidelines, from 1987 through 2001, which evidence the Guidelines’ complexity); see also Mark Osler, *Death to These Guidelines, and a Clean Sheet of Paper*, 21 FED. SENT’G REP. 7, 12 (2008) (“[T]hose Guidelines have become bloated and confusing . . . and have simply become more so as each branch of government has had its turn making things ever more complicated.”).

67. As one former federal district court judge writes, “defendants confront a judge who far too often, just ‘does the math,’ situates the defendant on the grid, and sentences, no matter how anomalous or harsh the results.” Nancy Gertner, *Federal Sentencing Guidelines: A View From the Bench*, 29 HUM. RTS. 6, 8 (2002). Another has suggested the process is “inhumane and robotic.” Matthew Van Meter, *One Judge Makes the Case for Judgment*, THE ATLANTIC (Feb. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/> (characterizing the views of Hon. John Coughenour and adding that “Congress tried to convert [sentencing] into a science. And it’s not a science. It’s a human being dealing with other human beings. And it shouldn’t be done by computers.”).

68. FRANKEL, CRIMINAL SENTENCES, *supra* note 30, at 124.

69. See Frank O. Bowman, III, *Nothing Is Not Enough: Fix the Absurd Post-Booker Federal Sentencing System*, 24 FED. SENT’G REP. 356, 356 (2012) (“[The Guidelines] subdivided the universe of possible sentences into 258 boxes, which critics said served largely to create a reassuring illusion of rationally calibrated allocations of punishment.”).

70. See, e.g., *United States v. Newhouse*, 919 F. Supp. 2d 955, 957 (N.D. Iowa 2013).

71. The sufficiency of silence in sentencing, insofar as the sentence imposed is within the Guidelines range, troubled several Justices. See Transcript of Oral Argument at 35, *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016) (No. 14-8913) (probing how a defendant could prove plain error where “the judge is within the Guidelines [and] he doesn’t have to say anything more about it”); *id.* at 41 (“If . . . the sentence is within the Guidelines, the judge doesn’t have to say anything at all. So it’s very difficult for the defendant to go back and say, here’s what the error was even though there’s also a clear error, a plain error in what the original calculation was.”); *id.* at 36–37 (asking what may be done about “most Sentencing Guidelines cases, certainly in this case,” in which “the judge says nothing. He’s told the probation office said these are the Guide-

The numbers-based system also makes the Guidelines an effective tool for prosecutors. That is, the probation officer, prosecutor, and defense counsel can do a Guidelines calculation in advance of sentencing and the resulting range serves as a good approximation of the ultimate sentence. Knowing the likely sentence in advance, the prosecutor can point to this baseline as a reliable starting point for plea negotiations, and thus, has significant leverage in the plea negotiation process.⁷³ To be sure, this relative certainty is seen as a positive attribute of the numbers-based Guidelines system.⁷⁴ A byproduct of this certainty, however, is the heightened bargaining position of the prosecutor. The prosecutor's advantaged power is reflected in the increasing and extremely high rate of guilty pleas: ninety-seven percent of federal criminal cases are resolved by way of guilty pleas,⁷⁵ whereas the corresponding number was eighty-seven percent in the first year of the Guidelines era.⁷⁶ The rise in pleas is not coincidental; indeed, one federal district court judge asserted that "[e]nhanced [p]lea [b]argaining [i]s [a]ctually the [c]entral [g]oal of the Guidelines."⁷⁷ If the numbers-based

lines, and the judge says, okay. . . . Doesn't explain why."); *see also id.* at 6 (addressing the situation, which "will—may very often be the case"—in which "the judge . . . imposes a sentence within what the judge believes to be the Guideline range but says nothing whatsoever beyond that, and it turns out that that is not the correct Guidelines range, so that there's no evidence one way or the other about what the judge would have done had the judge understood the correct Guidelines range").

72. *See Rita v. United States*, 551 U.S. 338, 347 (2007) (upholding courts' presumption that a sentence imposed within the Guidelines is reasonable).

73. *See* STITH & CABRANES, *supra* note 23, at 145 (discussing the shift in power to prosecutors due to the advance knowledge of a sentencing range).

74. *See* Wes R. Porter, *The Pendulum in Federal Sentencing Can Also Swing Toward Predictability: A Renewed Role for Binding Plea Agreements Post-Booker*, 37 WM. MITCHELL L. REV. 469, 483 (2011) ("A defendant pleading guilty during the mandatory Guidelines era had a firm understanding about what lie ahead at sentencing. The individual defendant valued the benefits of predictability and informed decision making . . .").

75. U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET, FISCAL YEAR 2015, SECOND CIRCUIT 3–5, tbl.2, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2015/2c15.pdf>. In the Fifth and Tenth Circuits, pleas accounted for 98.6% of criminal cases, thus only 1.4% of cases went to trial. *Id.*

76. STITH & CABRANES, *supra* note 23, at 130; *see also* William W. Wilkins, Jr. et al., *Competing Sentencing Policies in a "War on Drugs" Era*, 28 WAKE FOREST L. REV. 305, 325 (1993) ("The nationwide plea-trial ratio has remained relatively constant before and after implementation of the guidelines, at about eighty-five percent of cases disposed of by guilty pleas." (citing UNITED STATES SENTENCING COMM'N, ANNUAL REPORT 59 (1991))).

77. *United States v. Green*, 346 F. Supp. 2d 259, 270 (D. Mass. 2004) (emphasis added) ("[G]uilty offenders hope against hope for some especial leniency and, when that hope is dashed by defense counsel explaining that the Guidelines foreclose such result . . . many will plead guilty to obtain the discount offered by the Department [of Justice] to induce a plea."); *see also* *United States v. Beserra*, 967 F.2d 254, 256 (7th Cir. 1992) ("The framers of the sentencing guidelines were not, we take it, addressing the metaphysics of human responsibility. No doubt they wanted to encourage the guilty to plead guilty . . .").

system aids judges who need only do the math and prosecutors who can induce guilty pleas, it offers very little for the criminal defendant.⁷⁸

D. The Guidelines Are Unduly Severe

The Guidelines call for severe sentences. Congress, through its enactment of mandatory minimum sentences, is most responsible for such severity and mass incarceration in the federal system.⁷⁹ But nonetheless, the Guidelines contribute to the overgrown federal prison population.⁸⁰ As Justice Kennedy observed, “[O]ur punishments [are] too severe, our sentences [are] too long. In the federal system the sentencing guidelines are responsible in part for the increase in prison terms.”⁸¹

The severity of the Guidelines is perhaps most evident in the context of drug offenses. Soon after Congress enacted the SRA, it also enacted the

78. A common refrain is that a criminal defendant does not end up in federal court unless they have done something truly “bad” and is, thus, not a terribly sympathetic figure. Even assuming that a federal criminal defendant is convicted of a highly blameworthy offense, this fact alone does not mean the defendant should be at a serious disadvantage in the sentencing phase or functionally surrender his or her Sixth Amendment rights. See *infra* Part IV.B.5 (discussing the Sixth Amendment rights of criminal defendants); *infra* n.313 (explaining the “trial penalty”).

79. See Brent E. Newton, *The Story of Federal Probation*, 53 AM. CRIM. L. REV. 311, 345 n.152 (2016) (explaining the average sentence of a federal offender subject to a mandatory minimum sentence is 139 months of imprisonment, whereas the average sentence of a federal offender not subject to a mandatory minimum sentence is 28 months); Sessions, *supra* note 60, at 331 (“There are now over 170 provisions that bear mandatory minimum sentences. Twenty-eight percent of the federal criminal cases subject to the sentencing guidelines in 2009 involved statutes that carried mandatory minimums. That figure increases to 40% of the docket if immigration cases are excluded.” (citations omitted) (first citing to U.S. SENTENCING COMM’N, FY2009 DATASET (2009); then citing *Mandatory Minimum Sentencing Laws: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 1 (2007) (statement of Ricardo H. Hinojosa, Chairman, U.S. Sentencing Commission); and then citing U.S. SENTENCING COMM’N, FY2009 DATASET (2009))). The prison population is decreasing relative to prior years. See Jennifer Levitz, *Prison Population in the U.S. Shrinks to Smallest in a Decade*, WALL ST. J. (Dec. 29, 2016), <http://www.wsj.com/articles/prison-population-in-the-u-s-shrinks-to-smallest-in-a-decade-1482987660>. But, over-incarceration remains problematic in absolute terms and relative to other countries. See Barack Obama, Commentary, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816–17 (2017).

80. See STITH & CABRANES, *supra* note 23, at 59–65; Gerard E. Lynch, *Letting Guidelines Be Guidelines (and Judges Be Judges)*, OSCJL AMICI: VIEWS FROM THE FIELD, 4 (Jan. 2008), <http://osjclblogspot.com> (“I suspect that a large number, perhaps a majority, of judges believe that the overall sentencing pattern of the guidelines is excessively severe.”); see also Marc L. Miller, *Domination & Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1222–23 (2004) (analyzing statistics suggesting that the Guidelines are too severe). But see Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1020–43 (2004) (arguing that the Guidelines are “tough,” but not “too harsh,” and that the Guidelines as a whole need not be reduced downwards).

81. Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting, (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/viewsspeech/sp_08-09-03 [hereinafter Justice Kennedy’s Speech].

Anti-Drug Abuse Act, which set mandatory minimum penalties for drug offenses.⁸² The Commission interpreted these statutory penalties as congressional directives to impose stringent guideline penalties for drug offenses.⁸³ Controversially, the Commission extrapolated from the mandatory minimums in establishing the drug guidelines. United States Circuit Judge Jon O. Newman explained, “the guidelines table for sentencing drug crimes sets two to three grams at level twenty, three to four grams at level twenty-two, four to five grams at level twenty-four, and so on.”⁸⁴ The result is an escalating scale of punishment,⁸⁵ based on incremental increases in drug quantity.

Severity has significant human costs. There is increasing awareness that the present operation of the criminal justice system has adverse impacts on families and communities,⁸⁶ particularly minorities and the poor,⁸⁷ and society more generally.⁸⁸

82. Act of Oct. 27, 1986, Pub. L. No. 99-570, 100 Stat. 3207 (strengthening federal efforts to “eradicate” illicit drug sales and use).

83. See Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1309 (1997) (“The drug Guidelines . . . are anchored to mandatory minimums rather than to past practice, because mandatory minimums represent a deliberate departure from past practice.”).

84. *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2072–73 (1992) [hereinafter Judge Newman’s Remarks].

85. See 2016 U.S.S.G., *supra* note, 41 § 5A.

86. See PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES, AND COMMUNITIES (Jeremy Travis & Michelle Waul eds., 2003); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, in PRISONS 122 (Michael Tonry & Joan Petersilia eds., 1999); cf. Carrie Johnson & Marisa Peñaloza, *Judge Regrets Harsh Human Toll of Mandatory Minimum Sentences*, NPR (Dec. 16, 2014), <http://www.npr.org/2014/12/16/370991710/judge-regrets-harsh-human-toll-of-mandatory-minimum-sentences> (“We talk about numbers, but at the end of the process it’s not a number that’s getting the sentence . . . It’s a person, a person with a family from a community.” (quoting then-U.S. District Judge John Gleeson)).

87. See U.S. SENTENCING COMM’N, DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING PRACTICES: AN UPDATE OF THE BOOKER REPORT’S MULTIVARIATE REGRESSION ANALYSIS 23 (2010) (“[From 2007–2009,] black male offenders received sentences that were 23.3 percent longer than those imposed on white males.”); U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 122 (2004).

[A] typical Black or Hispanic offender has somewhat greater odds of being imprisoned when compared to a typical White offender. . . . The odds of a typical Black drug offender being sentenced to imprisonment are about 20 percent higher than the odds of a typical White offender, while the odds of a Hispanic drug offender are about 40 percent higher.

Id.; see also NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 2 (Jeremy Travis et al. eds., 2014) (“Those who are incarcerated in U.S. prisons come largely from the most disadvantaged segments of the population. They comprise mainly [of] minority men under age

E. The Guidelines Are Not Reliably Followed

Compliance with the Guidelines has tanked. The mandatory Guidelines were to establish order in a sentencing world without standards in between statutory minimums and maximums. But *Booker* rendered the Guidelines merely advisory.⁸⁹ Diminished compliance and disparities followed.⁹⁰

For example, in 1991, federal courts imposed non-government sponsored sentences below the Guidelines in roughly six percent of all cases,⁹¹ meaning that courts decided that a non-Guidelines sentence was appropriate even though the government argued that the sentence should be within the Guidelines. The situation is much different today. According to a recent data report from the Commission, in 20.7% of cases courts impose a sentence outside of the Guidelines system, notwithstanding government arguments to stay within it.⁹² In some circuits, such as the Second and the Seventh, non-government sponsored, non-Guideline sentences approach or are at the forty percent mark.⁹³

40, poorly educated, and often carrying additional deficits of drug and alcohol addiction, mental and physical illness, and a lack of work preparation or experience.”).

88. See *United States v. Hiveley*, 61 F.3d 1358, 1365 (8th Cir. 1995) (Bright, J., concurring) (“If [certain] low-level drug offenders serve an extra five years of imprisonment over what is a proper, non-guideline, sentence, the cost to the taxpayers exceeds one and three-quarters billion dollars (\$1,794,760,000.00.”); *United States v. Chavez*, 230 F.3d 1089, 1090–92 (8th Cir. 2000) (Bright, J., concurring).

[T]he sentences imposed by the Sentencing Guidelines are often a waste of time and money. . . . It costs the United States government and its taxpayers approximately \$22,000 per year to keep a federal offender in prison. . . . Th[e] sentence [in this case] is a waste of time, money, and more importantly, a man’s life. These unwise Sentencing Guidelines put nonviolent offenders in prison for years, they ruin the lives of the prisoners, their families, and they also hurt our economy and our communities by draining billions of dollars from the taxpayers and keeping potentially productive members of society locked up. The opportunity costs imposed by the Sentencing Guidelines are staggering.

Chavez, 230 F.3d at 1091–92 (Bright, J., concurring) (footnote omitted); see also *United States v. Jeross*, 521 F.3d 562, 587–88 (6th Cir. 2008) (Merritt, J., dissenting) (“The cost to the taxpayers and in human lives [imposed by applying the Guidelines] has become enormous and shows no signs of change.”). This is not to suggest that the underlying crimes do not hurt families, communities, and society, because they most undoubtedly do. The issue, however, is that unduly severe sentences may themselves introduce externalities without sufficient justification. See generally 18 U.S.C. § 3553(a) (2012) (requiring sentences to be “sufficient, but not greater than necessary” to further the purposes of punishment).

89. *United States v. Booker*, 543 U.S. 220, 245 (2005).

90. See Judge Pryor’s Response, *supra* note 63, at 280 (“[T]here can be no dispute that inter-judge sentencing disparities, regardless of whether they contribute to demographic disparities, have substantially increased since *Booker* as a result of judges’ unfettered discretion to vary from the guidelines coupled with no meaningful appellate review.”).

91. See *Wilkins et al.*, *supra* note 76, at 325.

92. See U.S. SENTENCING COMM’N, QUARTERLY DATA REPORT 11 tbl.8 (2016).

93. See *id.* at 12–14 tbl.9.

The extent to which courts deviate from the Guidelines reveals a fuller picture of non-compliance with the Guidelines. Non-government sponsored, non-Guidelines sentences are, on average, 36.2% below the applicable Guidelines minimum.⁹⁴ The percentage of non-Guidelines sentences and the degree of the departures support the sense that there are, in effect, two types of sentencing judges: those who stick to the Guidelines and those who do not.⁹⁵

As Guidelines compliance has dropped, disparities have increased. The Commission has noted such disparities across the country and within the same district.⁹⁶ “[E]mpirical evidence proves that sentencing disparities—the primary concern that led to the creation of the guidelines—have increased since the guidelines became advisory[,]” the Acting Chair of the Commission, United States Circuit Judge William H. Pryor, Jr., observed.⁹⁷ The evidence that the Guidelines are unable to fulfill the very reason they were put into existence calls into question the value of the Guidelines as a whole.

F. The Guidelines Do Not Promote Meaningful Appellate Review

Federal appeals courts are effectively rubber-stamping the sentences of district courts. Appellate courts are to review sentences under an abuse of discretion standard, which consists of two parts.⁹⁸ Double-checking the math comprises the procedural reasonableness part of appellate review.⁹⁹ As former United States District Judge and current Harvard Law Professor Nancy Gertner acknowledged, “[t]he appellate courts are doing little more than checking the lower courts’ math—did you compute the numbers correctly—and if the computations are correct, affirming virtually every sen-

94. *See id.* at 26 tbl.17.

95. *See* Letter from Jonathan J. Wroblewski, Dir., Office of Policy & Legislation, U.S. Dep’t of Justice, to Hon. William K. Sessions III, Chair of the U.S. Sentencing Comm’n (June 28, 2010), *reprinted in* 23 FED SENT’G REP. 282, 282–83 (2011) (“[T]here is the federal sentencing regime that remains closely tied to the sentencing guidelines. . . . On the other hand, there is a second regime that has largely lost its moorings to the sentencing guidelines.”).

96. *See* U.S. SENTENCING COMM’N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 8 (2012) (“Variation in the rates of non-government sponsored below range sentences among judges within the same district has increased in most districts since *Booker*, indicating that sentencing outcomes increasingly depend upon the judge to whom the case is assigned.”).

97. Judge Pryor’s Remarks, *supra* note 63, at 95; *see also* Sessions, *supra* note 60, at 329–30 (“[D]isparities in federal sentencing—both inter-judge and demographic disparities—have been increasing steadily” since *Booker*.).

98. *See* *Gall v. United States*, 552 U.S. 38, 51 (2007).

99. *See id.*; *see also* Judge Pryor’s Remarks, *supra* note 63, at 99 (“After *Booker*, appellate courts continue to check the district court’s math about guidelines minutiae—what is called review for ‘procedural reasonableness.’”).

tence”¹⁰⁰ If an appeals court happens to find a calculation error and sends the case back, the district court will correct the numbers and find a way to arrive at the same sentence.¹⁰¹ In the second part of the appellate review, the court is to ensure, based on the totality of the circumstances, that the sentence is substantively reasonable.¹⁰² The substantive reasonableness is helped along by a presumption that a within-Guidelines sentence is reasonable.¹⁰³ Judge Pryor revealed that he “and other appellate judges liken [substantive reasonableness] to deciding whether a sentence ‘shocks the conscience.’”¹⁰⁴ “This highly deferential review rarely leads to reversals,” he added.¹⁰⁵

* * *

These issues suggest that the problems with the Guidelines are significant and likely cannot be saved by way of further modifications on the margins.¹⁰⁶ As Judge Pryor boldly stated, “[i]nstead of continuing to tinker with the advisory guidelines, we now need to tackle a more fundamental reform.”¹⁰⁷ Indeed, the Supreme Court’s remedy in *Booker* was to be a “temporary fix,”¹⁰⁸ indicating that lasting, robust change should follow. Twelve years and half-a-million federal defendants later, there has not been any such meaningful solution.¹⁰⁹ Ironically, Congress instructed that the Guidelines are to be grounded in evidence.¹¹⁰ The evidence offered in this Part supports the finding of a crisis demanding at least the consideration of a different paradigm.¹¹¹

100. Judge Nancy Gertner (Ret.), *Opinions I Should Have Written*, 110 NW. U. L. REV. 423, 438 (2016). *But see Gall*, 552 U.S. at 68 (Alito, J., dissenting) (“Appellate review for abuse of discretion is not an empty formality.”).

101. Judge Pryor’s Remarks, *supra* note 63, at 99.

102. *See Gall*, 552 U.S. at 51.

103. *See id.*

104. Judge Pryor’s Remarks, *supra* note 63, at 99.

105. *Id.*

106. *See, e.g., Rakoff, supra* note 49, at 6 (proposing that the Guidelines be “scrapped in their entirety and replaced”).

107. Judge Pryor’s Remarks, *supra* note 63, at 96.

108. *Id.* at 95; *see United States v. Booker*, 543 U.S. 220, 265 (2005) (“The ball now lies in Congress’ court. The National Legislature is equipped to devise and install, long-term, the sentencing system . . .”).

109. *See* Judge Pryor’s Remarks, *supra* note 63, at 95.

110. *See* 28 U.S.C. § 994(o) (2012) (requiring that the Guidelines be revised in light of “data coming to [the Commission’s] attention”); *see also United States v. Pozzy*, 902 F.2d 133, 140 (1st Cir. 1990) (“We have embarked on a new course. . . . Only time will tell whether the use of the guidelines will result in an improvement over the old system.” (citation omitted) (citing *United States v. Williams*, 891 F.2d 962, 967 (1st Cir. 1989))).

111. *See* Sessions, *supra* note 60, at 310 (“My proposed system would not be perfect At the very least, my proposal is intended to advance the dialogue regarding changes that are need-

IV. TOWARDS THE SECOND FOUNDING

This Article seeks to lay the groundwork for that alternative federal sentencing system.¹¹² Before detailing this new system, it is important to address and dispense with the proposition that federal judges should not have a guide at all.¹¹³ It is true that, without such a coordinated system, judicial discretion would be maximized. But, judges, bound only by constitutional or statutory constraints, would be without the benefit of further information that can help channel that discretion.¹¹⁴ This hands-off approach would reintroduce the very arbitrariness that helped give rise to the Guide-

ed.”). The identification of concerns with the Guidelines and the introduction of a different model should not be construed as an attack on, or criticism of, the Commission. Indeed, Congress established the parameters for the Guidelines, and the Commission’s subsequent responses are consistent with, if not mandated or encouraged by, the SRA and congressional intent. See Stith & Koh, *supra* note 33, at 284 (“[O]ur examination of the statute and its legislative history demonstrates, we believe, that, by and large, the Commission has implemented the Sentencing Reform Act in a manner consistent with legislative intent. . . . Many provisions of the statute either mandate or strongly encourage the policy choices that the Commission made . . .”). Even with the limited parameters provided, it is difficult to design a workable sentencing system that balances uniformity and proportionality. See William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. DAVIS L. REV. 571, 573–75 (1992) (discussing the tension between uniformity, proportionality, and workability). Additionally, it is difficult to design a sentencing system that can reconcile the competing purposes of punishment. See Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 230 (1993) (maintaining that building “perfect” guidelines is not attainable, therefore, the goal is to create one that is workable and an improvement upon the status quo); Sessions, *supra* note 60, at 310 (“[N]o sentencing system ever will come close to being perfect.”).

112. Others, including Commissioners, have proposed different Guidelines models as well. See Judge Pryor’s Remarks, *supra* note 63; Sessions, *supra* note 60, at 310; Ruback & Wroblewski, *supra* note 66, at 770; see also Frank O. Bowman, III, *Beyond Band-Aids, A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 150 (2005). These proposals still assign numbers to facts and then fit those numbers into a more concise table. This Article, by contrast, emphasizes arguments over the meaning of facts without affixing any numerical value to those facts. The Commission itself took a stab at a more concise Guidelines manual. It failed to change the fundamental nature of the numbers-driven approach to the Guidelines. See *Simplification Draft Paper*, *supra* note 64. Also, the draft simplified guidelines are stale, having been authored in 1996. *Id.*

113. See Van Meter, *supra* note 67 (suggesting that only two sentencing schemes exist: “a world where a person’s actions are treated as part of a mathematical equation blind to context, or a world where political appointees decide people’s fates based on gut feelings”).

114. The six-month sentence imposed on a former Stanford University student for raping an unconscious woman—widely perceived as too lenient, the product of the sentencing judge’s sympathy for the defendant in light of some shared circumstances, and the sentencing judge’s consideration of irrelevant facts—is Exhibit A supporting some sort of guidelines system. See Paul Caspell, *What Sentence Should the Former Stanford Swimmer Have Gotten?*, WASH. POST (June 7, 2016), <http://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/06/07/what-sentence-should-the-stanford-swimmer-have-gotten/> (comparing the six-month sentence to sentencing under the Guidelines, that, for a first-time offender, would have been at least ninety-seven months and would not count the defendant’s voluntary intoxication as a mitigating factor).

lines in the first place.¹¹⁵ Accordingly, as Judge Newman noted, “we can and should find a place for discretion between the two poles of unfettered discretion and no discretion,”¹¹⁶ with the goal of avoiding unwarranted disparities as well as undue uniformity.¹¹⁷ The essence and promise of this guide are the following sentencing principles.

A. The Statutory Grade Shall Be the Starting Point for a Sentencing Determination

A fundamental issue with respect to sentencing is how to rank the 4,000–5,000 federal offenses¹¹⁸ by their relative seriousness.¹¹⁹ Initial drafts of the Guidelines responded to this task by inserting completely subjective values for offenses and corresponding offense characteristics.¹²⁰ The first published draft, as noted above, predicated penalty levels on past practice data, codifying what judges had been doing in the studied cases.¹²¹ The draft prepared by Commissioner Paul Robinson also categorized federal offenses into general categories, and this grouping was retained in subsequent drafts and in the published Guidelines.¹²²

As it turns out, Congress already has categorized and ranked offenses. It has done so in the form of offense grades. The assigned grades reflect Congress’s determination as to the relative seriousness of the offense.¹²³ For example, a Class C felony authorizes punishment of “less than twenty-five years but ten or more years,”¹²⁴ and the Class D felony authorizes punishment of “less than ten years but five or more years.”¹²⁵

115. See Newman, *supra* note 30, at 1564 (“Without any guidance on sentencing, is it any wonder that sentences appear to be all over the lot? Without any law to apply, judges simply have to make it up as we go along.”); Transcript of Oral Argument at 18, *United States v. Booker*, 543 U.S. 220 (2005) (No. 04-104) (“[I]n discretionary sentencing . . . [a judge] can just look at you and say, ‘I think you’re a bad actor, you’ve got forty years.’”).

116. See Judge Newman’s Remarks, *supra* note 84, at 2073.

117. See UNITED STATES SENTENCING COMMISSION: PUBLIC HEARING 136 (Feb. 10–11, 2009), <https://www.ussc.gov/sites/default/files/transcript.pdf> (“It is better to have five good sentences and five bad ones than to have ten bad but consistent sentences.”).

118. See Todd Haugh, *Overcriminalization’s New Harm Paradigm*, 68 VAND. L. REV. 1191, 1198–99 (2015).

119. Others have sought to identify the seriousness of offenses. See Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 228–29 tbl.1 (1974) (ranking 140 offenses according to seriousness).

120. See Newton & Sidhu, *supra* note 18, at 1203 (noting that the September 1986 draft had “placeholders” for penalty levels not based on data); *id.* at 1229 (noting the “Just Deserts” draft contained harm values assigned by Commissioner Robinson).

121. See *supra* note 55.

122. See Newton & Sidhu, *supra* note 18, at 1202, 1228.

123. SRA Legislative History, *supra* note 5, at 51.

124. 18 U.S.C. § 3559(a)(3) (2012).

125. *Id.* § 3559(a)(4).

The Commission should draw upon statutory grades. The reasons to do so are several. First, Congress directed the Commission to consider offense grades in developing the Guidelines.¹²⁶ The current Guidelines rely on these grades to a limited degree, as the Guidelines authorize terms of supervised release by offense grades.¹²⁷ Second, these grades may be owed greater deference, as Congress ostensibly codified the will of the people in setting the offense grades. Third, the grades are not random or without substance, but are designed to capture relative seriousness. The grades thus stand as a readily available, congressionally approved, statutorily memorialized, simplified, default way to organize and rank federal offenses.¹²⁸

It is important to acknowledge that the federal criminal code is considered a mess¹²⁹ and that congressional attempts at federal criminal code reform have failed.¹³⁰ Indeed, in the 1980s, the only part of federal criminal code reform that survived was the Sentencing Reform Act.¹³¹ Given the state of the federal criminal code, some may balk at any suggestion that penalty levels should be informed by offense grades. As to this likely objection, I note three things: first, this Article proposes that the offense grades be deployed as the default *starting point* for penalty levels; second, Congress already has directed the Commission to consider offense grades and the grades, however uncoordinated, nonetheless enjoy the status of federal law; and third, as explained below, the Commission may adjust the penalty levels otherwise dictated by offense grades in view of sentencing data, and the expert and informed commentary of the sentencing community.¹³² If Congress has failed at criminal code reform, there is nothing preventing the Commission, delegated by Congress to serve as an expert body on federal sentencing, from bringing greater clarity and coherence to the code. It has had over thirty years to do precisely this. At the end of the day, offense grades would serve as the jumping off point for penalty levels, rather than be brushed aside entirely as if criminal offenses operate on a clean legal slate.

The offense grade is not the only statutory penalty that applies to criminal offenses. In certain instances, Congress also has specified statutory

126. 28 U.S.C. § 994(c)(1) (2012).

127. 2016 U.S.S.G., *supra* note 39, § 5D1.2.

128. See Judge Pryor's Response, *supra* note 63, at 279 (acknowledging that, with code reform, "a guideline model based primarily on the offense of conviction might be appropriate for the federal system").

129. See *id.* (referring to the federal criminal code as "a crazy-quilt of over 4,000 crimes spread throughout dozens of titles of the United States Code and enacted by many Congresses over several decades").

130. See Newton & Sidhu, *supra* note 18, at 1175–76.

131. See *id.* at 1176.

132. See *infra* Part III.H.

minimums and/or maximums that apply to criminal offenses. For example, the violation of 18 U.S.C. § 2252A(a)(1), the transportation of child pornography, carries with it a mandatory minimum of five years and a statutory maximum of twenty years.¹³³ Accordingly, in addition to identifying the grade of the offense, a judge also must determine if Congress has enacted a statutory minimum or maximum that further restricts the sentencing range otherwise dictated by the statutory grade.

B. The Midpoint Between the Applicable Statutory Range Shall Be the Default Sentence

To the extent that guidelines are supposed to serve as a “national norm,”¹³⁴ the governing statutory grades will put counsel and judges in a general ballpark for the sentence to apply for each offense. An offender who commits a Class C felony, for example, will know the statutory range of the punishment. An offender who transports child pornography will know there are statutory minimums and maximums that adjust the statutory range for a Class C felony.

But the offense of conviction, the statutory grade, and the mandatory minimums/maximums will only get a sentencing judge so far. Narrowing that ballpark even further can be accomplished by way of insisting that the default sentence would be the midpoint of the statutory maximum and minimum. For a Class C felony, for example, that midpoint would be seventeen-and-one-half years.¹³⁵ In circumstances in which Congress has specified an alternate statutory minimum and/or maximum for violations of a particular statute, the operative midpoint would be between these minimums and/or maximums. For example, Congress has set the maximum penalty for a violation for a particular Class C felony at twenty years.¹³⁶ Though the general range for a Class C felony is ten to twenty-five years, and the midpoint seventeen-and-one-half years, the statutory cap for that particular Class C Felony is twenty years, meaning the midpoint would be between ten and twenty years—fifteen years.

There is an important caveat to this rule. The application of this model to actual cases, in *infra* Part V.A., demonstrates that there is significant distance between the sentences dictated by this model and the sentences generally imposed under the current Guidelines. A drastic change from past practice may invite revolt from the federal judiciary. It bears reminding that, as to be explained more fully in *infra* Part V.B, the Commission would

133. 18 U.S.C. § 2252A(b)(1) (2012).

134. *See, e.g.*, *United States v. Smith*, 445 F.3d 1, 5 (1st Cir. 2006); *United States v. Gonzalez-Huerta*, 403 F.3d 727, 738 (10th Cir. 2005).

135. 18 U.S.C. § 3559(a)(3) (2012).

136. 8 U.S.C. § 1326(b)(2) (2008).

be empowered by statute and by this model to modify the midpoint in light of past practice and its considered expert judgment.¹³⁷

C. The “Typical” Case Shall Receive a Sentence Within 25% of the Average of the Applicable Statutory Grade

One of the key elements of the SRA is the infamous “25% rule.”¹³⁸ While this Article is critical of the present numbers-centric approach to federal sentencing, the 25% rule helps explain why the Commission relied so heavily on a quantitative approach to the Guidelines. In particular, the SRA directed the Commission to establish sentencing “range[s].”¹³⁹ The SRA also demanded that, for prison sentences, the difference between the high-end and low-end of any such range be 25% or no greater than six months, whichever is greater.¹⁴⁰

The 25% rule leaves little doubt that the ranges were to be numerically expressed.¹⁴¹ It also helps explain the large number of boxes in the Guidelines.¹⁴² More specifically, the Commission determined that, to comply with the “25% rule” and to produce overlapping ranges to reduce litigation disputes, forty-three offense levels would be needed.¹⁴³ Without the overlap, the argument goes, every factual difference could lead to a completely different sentencing range, each difference would become that much more significant in real terms, and factual conflicts between counsels would intensify.¹⁴⁴

Congress expected that sentences would not differ by more than 25% for cases with similar offenses and offenders.¹⁴⁵ The 25% range thus represented where the “typical” case would fall.¹⁴⁶ If a case presented a fact or circumstance to an unusual degree, the Commission invited the judge to de-

137. 28 U.S.C. § 994(m) (2012).

138. *Id.* § 994(b)(2).

139. *Id.* § 994(b)(1).

140. *Id.* § 994(b)(2).

141. *But see* Marc Miller, *True Grid: Revealing Sentencing Policy*, 25 U.C. DAVIS L. REV. 587, 590–95 (1992).

142. *See* U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON THE INITIAL SENTENCING GUIDELINES AND POLICY STATEMENTS 15 (1987).

143. 2016 U.S.S.G., *supra* note 41, ch.1, pt. A, introductory cmt. Forty-three offense levels and six criminal history categories yields a 258-cell grid.

144. *Id.*

145. *See* SRA Legislative History, *supra* note 5, at 79 (“If the sentencing court believed the case was an entirely typical one for the applicable guideline category, it would have no adequate justification for deviating from the recommended range.”).

146. *See id.*

part, or impose a sentence outside of the 25% range.¹⁴⁷ Thus, the 25% rule gave judges some wiggle room within which to operate, but ultimately limited judicial discretion to this 25% window for ordinary cases. This structured discretion would, for the heartland of cases, curb sentencing disparities.

This Article similarly provides that the sentences for typical cases shall not differ from the midpoint of the applicable statutory range by more than 25%. In this respect, the Article retains the core purpose of the 25% rule: to allow judges discretion to facilitate proportional sentencing, and to cap that discretion to obviate undue sentencing disparities. To the extent that the 25% window seems generous, in practice the discretion of judges will be limited to 12.5%. This is because judges, drawing on the aggravating and mitigating factors, will be able to identify whether the case generally is an aggravated or mitigated one¹⁴⁸; judges then would be able to pinpoint, with reference to the enumerated factors, where along the 12.5% spectrum the case fits.

This Article also provides that, as in the Guidelines system, a judge may depart from the 25% window if the judge states, on the record, that an aggravating or mitigating factor is present to an unusual degree.¹⁴⁹ Departures will trigger a reinvigorated form of appellate review, described below.¹⁵⁰ To comply with the other part of the 25% rule—that the minimum and maximum range be no more than six months apart—six-month ranges can be located within the 25% window. These internal ranges can serve as six-month markers that counsel and judges could then use to identify where along the 25% spectrum the sentence can and should fall.

The first three principles—using the statutory grade as the starting point for a sentencing determination, basing adjustments from the applicable average sentence on enumerated and unweighted aggravating and miti-

147. See 2016 U.S.S.G., *supra* note 41, ch. 1 pt. A, introductory cmt. (“When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.”).

148. See Ruback & Wroblewski, *supra* note 66, at 771.

149. This concept in the Guidelines seems to be well-received. See Michael W. McConnell, *The Booker Mess*, 83 DENV. U. L. REV. 665, 682 (2006) (“[T]he Guidelines continue to be the benchmark for responsible judging, with variances only for unusual cases.”).

150. See *infra* Part IV.D.

gating factors, and requiring adjustments for ordinary cases to be within 25% of the applicable average, and within internal six-month ranges—would yield the following:

Grade	Statutory Minimum	Statutory Maximum	Midpoint	Low-end of 25%	High-end of 25% Range
Class A Felony	Life	Life	Life	Life	Life
Class B Felony	25 years	61 years ¹⁵¹	43 years	37 years, 8 months	48 years, 5 months
Class C Felony	10 years	25 years	17 years, 6 months	13 years, 2 months	21 years, 11 months
Class D Felony	5 years	10 years	7 years, 6 months	5 years, 8 months	9 years, 5 months
Class E Felony	1 year	5 years	3 years	2 years, 3 months	3 years, 9 months
Class A Misd.	6 months	1 year	9 months	7 months	11 months
Class B Misd.	30 days	6 months	3.5 months	3 months	4 months
Class C Misd.	5 days	30 days	17.5 days	13 days	22 days

D. Adjustments from the Midpoint Shall Be Based on Enumerated, Unquantified Aggravating and Mitigating Factors

To individualize the sentence, a judge may move upwards or downwards from the midpoint based on enumerated factors. No fixed numerical values will be assigned to the factors. Instead, counsel will offer, and judges consider, arguments as to the applicability and meaning of the factors.¹⁵² Accordingly, prosecutors, defense counsel, and judges will have more of an opportunity to influence sentencing. At present, sentencing is largely a me-

151. Class B felonies specify a numerical statutory minimum of twenty-five years, but contain a non-numerical statutory maximum. 18 U.S.C. § 3559(a)(2). As Class A felonies dictate only life, *id.* § (a)(1), Class B felonies are understood to cover twenty-five years to life. *See, e.g.,* United States v. Good, 25 F.3d 218, 220–21 (4th Cir. 1994). Life expectancy for males in the United States is seventy-nine years. Kenneth D. Kochanek et al., *Deaths: Final Data for 2014*, 65 NAT'L VITAL STATS' REPS., NO. 4, JUNE 30, 2016, at 1, 4, https://www.cdc.gov/nchs/data/nvsr65nvsr65_04.pdf. An offender reaches adult status at eighteen-years old. 2016 U.S.S.G., *supra* note 41, §4A1.2(d)(2). Accordingly, the *de facto* life term reasonably may be considered sixty-one years.

152. *See* Solem v. Helm, 463 U.S. 277, 292 (1983) (“[C]ourts are competent to judge the gravity of an offense, at least on a relative scale. In a broad sense this assumption is justified, and courts traditionally have made these judgments . . .”).

chanical practice, akin to accounting, in which prosecutors and defense counsel tend to focus narrowly on the Guidelines scores in the Pre-Sentence Investigation Report (“PSR”).¹⁵³ Under this Article’s proposal, however, the PSR will not have such a decisive, if not determinative, impact on the ultimate sentence. Nor would the influence of prosecutors and defense counsel be effectively limited to challenging numbers in the PSR. Instead, counsel would have greater space to influence sentencing with substantive arguments, as they would be able to contest not only the relevance of enumerated factors, but also the qualitative weight to be assigned to the relevant factors. Moreover, the primary temporal focus of counsel would no longer be the stage at which the PSR is prepared and objected to, but would shift to the sentencing hearing.¹⁵⁴ Significantly, with the relevance and weight of factors up for grabs, to be claimed by counsel, sentencing would ease the leverage held by prosecutors and resemble a more balanced sentencing process.¹⁵⁵

This approach has other, ancillary benefits. The factors would effectively standardize the considerations that inform federal sentencing. The factors would focus analyses by probation officers, arguments by prosecution and defense counsel, and determinations by judges. As judges engaging in sentencing decision-making would proceed down the same path, using the same closed universe of factors, the extent of prosecutorial leverage and the prospects for sentencing outcomes to result in undue disparities may be minimized.¹⁵⁶ In rooting sentencing in factors, this Article’s proposal would pull federal sentencing closer to what Judge Frankel had in mind when he suggested national sentencing guidelines. In particular, Judge Frankel suggested a “checklist of factors.”¹⁵⁷ Moreover, turning to factors

153. As one federal public defender has told the Author, his job as a public defender was effectively reduced to two tasks: (1) making arguments to the probation officer that will result in the lowest Guidelines range possible, and (2) encouraging his client to accept the plea offer in light of the (hopefully lowered) Guidelines range set forth by the probation officer in the PSR.

154. See Marc L. Miller & Ronald F. Wright, *Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice*, 2 BUFF. CRIM. L. REV. 723, 726 (1999) (“[The Guidelines have] raise[d] the analysis of probation officers above the arguments of lawyers and the reasoning of judges . . .”).

155. See generally *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (“There is no doubt that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.”).

156. See Judge Pryor’s Response, *supra* note 63, at 281 (“[I]n a simpler system with fewer sentencing decision-points, prosecutors will have less opportunity, not more, to manipulate sentences.”)

157. FRANKEL, CRIMINAL SENTENCES, *supra* note 30, at 114. To be sure, Judge Frankel also stated that the factors should be accompanied by “some form of numerical or other objective grading.” *Id.* This may lead some to suggest that only a numbers-based system would realize Judge Frankel’s vision. But doing so would ignore the “or” in the sentence, which suggests that the grading could be numerical or non-numerical.

would reduce the emphasis on numbers in the federal sentencing system and fill the void with qualitative factors.

1. The Source of the Factors

A critical choice in the formulation of a multi-factor guideline system is the selection of the factors themselves.¹⁵⁸ The possibilities are endless. In the end, this Article identifies twenty factors that Congress itself enumerated in the SRA¹⁵⁹ and detailed in the comprehensive legislative history of the SRA.¹⁶⁰

Turning to Congress makes sense for at least three reasons. First, the statutory list of factors is ostensibly, as is the nature of federal legislation, the product of significant effort and compromise.¹⁶¹ A list that has gone through the legislative process has value over any independent set of factors that are developed from scratch and do not have congressional support. Second, the factors are already part of federal law and the congressional record.¹⁶² Accordingly, the sentencing policies contemplated by this Article are less drastic because they rely on existing law and the broader sense of Congress. Third, the expectation is that these factors will be exhaustive, representing all relevant factors.¹⁶³ Relying on Congress obviates the potential for a judge or counsel to invent other factors, and thereby obviates the reintroduction of sentencing inconsistencies.¹⁶⁴

The factors in the SRA are contained in 28 U.S.C. § 994(c), which corresponds with offense conduct, and 28 U.S.C. § 994(d), which corresponds

158. As the selection of factors entails choices, I must emphasize that this Article proposes and applies one factor-based system—it should not be construed as the definitive answer to whether any factor-based sentencing regime works. It, at most, should be read as a study of one particular factor-based model.

159. 28 U.S.C. §§ 994(c)–(d) (2012).

160. SRA Legislative History, *supra* note 5, at 169–170.

161. *See* United States R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 181 (1980) (Stevens, J., concurring) (“[O]ften . . . legislation is the product of multiple and somewhat inconsistent purposes that led to certain compromises.”); ROBERT A. KATZMANN, *JUDGING STATUTES* 15, 22 (2014) (“Congressional decisionmaking is the product of multiple decision points The laws of Congress are the product of often complex institutional processes, which engage legislators, staff, and other interests with stakes in the outcome.”). Several bills ultimately led to the SRA, which involved a number of back-and-forths between the House and Senate. *See* Stith & Koh, *supra* note 33, at 223–25.

162. *See* 28 U.S. § 994(c).

163. To the extent that one may be concerned that Congress may enact additional aggravating factors, thus generally enhancing sentences, the deliberate legislative process may diminish the specter of such “factor-creep.” *See* Judge Pryor’s Response, *supra* note 63, at 281.

164. By contrast, Congress expressly invites judges to depart when “the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission.” 18 U.S.C. § 3553(b)(1) (2012). This invariably will generate disparities, though appellate review is to guard against unwarranted disparities. *See* Koon v. United States, 518 U.S. 81, 96–97 (1996).

with the offender's background. This Article builds on the statutory factors by recognizing additional factors fleshed out in the legislative history of the SRA. The existing statutory factors can be quite general and, when one looks to the legislative history, the meaning of the skeletal factors can be more readily understood. For example, the statute directs a sentencing judge to consider "the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense,"¹⁶⁵ but the legislative history explains that these circumstances may include "the amount of harm done," "whether a weapon was carried or used," "whether the defendant was a lone participant in the offense," and whether the defendant "participated with others in a major or minor way. . . ."¹⁶⁶ Similarly, the existing statutory factors address the harm *caused* by the offense,¹⁶⁷ but do not expressly include the harm *intended* by the offense. The legislative history, however, expressly indicates that a sentence should reflect "the harm done *or* threatened by the offense."¹⁶⁸ Thus, "harm" for purposes of the factors includes not only actual harm, but intended harm as well. In sum, this Article brings to light the considerations detailed, but buried, in the legislative history.

This Article also mines federal court opinions in order to ensure that proper meaning is given to existing statutory factors. Consider a situation in which an offender defrauds victims out of their life savings. In order to capture loss from a qualitative standpoint, federal courts have increased an offender's sentence using the vulnerable victim enhancement.¹⁶⁹ But the proper focus of this enhancement is the nature of the victims, such as whether they are inexperienced, elderly, or otherwise susceptible to fraud, not the extent of the loss.¹⁷⁰ Also, federal courts in these same situations have based an upward departure on the psychological injury enhancement,¹⁷¹ as victims invariably suffer mental harm if their life savings are siphoned by a fraudster.¹⁷² But the use of this enhancement is problematic in that it rests the upward departure on the symptom—psychological impact—rather than the cause of the symptom—for example, the degree to which the offender has suffered an economic loss. Rather than continue the practice

165. 28 U.S.C. § 994(c)(2).

166. SRA Legislative History, *supra* note 5, at 75.

167. 28 U.S.C. § 994(c)(3).

168. *See* SRA Legislative History, *supra* note 5, at 76 (emphasis added).

169. This enhancement is grounded in SRA Legislative History, *supra* note 5, at 170, and found in 2016 U.S.S.G., *supra* note 29, § 3A1.1(b)(1).

170. *See, e.g.,* United States v. Sheneman, Nos. 3:10–CR–00120 (01) JD, 3:10–CR–00126 (02) JD, 2012 WL 2906859, at *16 (N.D. Ind. July 16, 2012).

171. This enhancement is grounded in SRA Legislative History, *supra* note 5, at 157, and is found in 2016 U.S.S.G., *supra* note 41, § 5K2.3.

172. *See, e.g.,* United States v. Waldner, 564 F. Supp. 2d 911, 941–42 (N.D. Iowa 2008).

of courts grafting upward departures onto vulnerable victim or psychological harm enhancements, courts using this Article's formulation need only use an enumerated factor: the extent of the harm or loss caused by the defendant. Doing so would reflect the honest basis for the sentence aggravation, and reserves the vulnerable victim and psychological injury factors for circumstances that directly warrant their use.

This Article's formulation also addresses a major concern with the current Guidelines: that the quantitative amount of loss and drugs in a case dominate the assessment of an offender's culpability,¹⁷³ with less attention given to the role that the offender may have in the underlying offense.¹⁷⁴ For example, a participant in a drug conspiracy may serve a significant sentence if the offender was caught with substantial quantities of narcotics, even if the offender was a "low-level" participant; the lengthy sentence would reflect the large amount of drugs because the amount is a proxy for culpability.¹⁷⁵ Under this Article's factor-based model, however, intent, motive, and role would be on par with (and not subordinate to) quantitative or qualitative harm.

This Article makes only one omission from the factors culled from the statute and legislative history: "the deterrent effect a particular sentence may have on the commission of the offense by others."¹⁷⁶ This is because, as noted below, deterrence considerations under this model are deemed, consistent with the Model Penal Code, to be limited by retributive considerations.¹⁷⁷

173. *See, e.g.*, *United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006) ("[T]he Sentencing Guidelines, because of their arithmetic approach and also in an effort to appear 'objective,' tend to place great weight on putatively measurable quantities, such as the weight of drugs in narcotics cases or the amount of financial loss in fraud cases."); Editorial Board, *Cut Sentences for Low-Level Drug Crimes*, N.Y. TIMES (Nov. 23, 2015), <https://www.nytimes.com/2015/11/23/opinion/cut-sentences-for-low-level-drug-crimes.html?mcubz=0> ("[A] person's sentence is determined by his role in a drug operation, and not by the entire amount of drugs found in that operation, which is a poor measure of culpability.").

174. *See, e.g.*, *United States v. Stuart*, 22 F.3d 76, 83 (3d Cir. 1994) ("[A]pplication of the Guidelines' monetary tables [can] bear[] little or no relationship to the defendant's role in the offense and greatly magnifies the sentence.").

175. *See, e.g.*, *United States v. Diaz*, No. 11-CR-00821-2 (JG), 2013 WL 322243, at *1 (E.D.N.Y. Jan. 28, 2013) ("[T]he Guidelines ranges for drug trafficking offenses are not based on . . . the actual culpability of defendants. . . . Instead, they are driven by drug type and quantity, which are poor proxies for culpability."). Accordingly, the Guideline "produce[] ranges that are excessively severe across a broad range of cases." *Id.* The same may be said of fraud, which also ties culpability to loss figures. *See, e.g.*, *United States v. Desmond*, No. 05 CR 729-4, 2008 WL 686779, at *3 (N.D. Ill. Mar. 11, 2008) ("[A] low-level employee, who had no role in devising the fraud scheme and would have received no financial benefit, is subject to several years of incarceration under the Guidelines.").

176. 28 U.S.C. § 994(c)(6) (2012).

177. *See infra* notes 274–281 and accompanying text.

2. *The Factors*

The factors may be presented in the form of a sentencing worksheet that may be included in a PSR. Such a worksheet would be similar to a Statement of Reasons (“SOR”) form already contained in PSRs, in that both have checklists of factors. The proposed worksheet would replace or, at a minimum, revise the current SOR. One may shirk at the length of such a worksheet, but the contemplated worksheet and current SORs are comparable in length. Indeed, SORs were recently expanded to include thirty-four enumerated reasons to depart and twenty-three enumerated reasons to vary.¹⁷⁸

A judge shall make specific adjustments to a sentence on the basis of the following factors:

The circumstances under which the offense was committed:¹⁷⁹

The offender’s intent¹⁸⁰

The offender’s motive¹⁸¹

The offender’s role in the offense¹⁸²

Whether the offense was committed spontaneously or was the result of substantial planning¹⁸³

Whether the offense was committed under duress not rising to the level of a defense, which mitigates the seriousness of the offense¹⁸⁴

Whether a weapon was used, or the use of a weapon was threatened, in the commission of the offense¹⁸⁵

The vulnerability of the victim(s)¹⁸⁶

The nature of harm caused or intended by the offense:¹⁸⁷

Whether it involved property, irreplaceable property, a person, or a number of persons¹⁸⁸

178. See U.S. Fed. Courts, Judgment in a Criminal Case Form AO 245B (Rev. 11/16).

179. 28 U.S.C. § 994(c)(2).

180. SRA Legislative History, *supra* note 5, at 170 (asserting that the Commission may consider “whether the offense was committed in reckless disregard of the safety of others”); see also *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (“It is fundamental that ‘causing harm intentionally must be punished more severely than causing the same harm unintentionally.’” (quoting H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 162 (1968))); see, e.g., *Dean v. United States*, 556 U.S. 568, 575 (2009) (“[A]n accidental discharge is less culpable than intentional brandishment.”).

181. See 1987 U.S.S.G. *supra* note 9, § 1B1.3(a); see also *Solem v. Helm*, 463 U.S. 277, 293–94 (1983) (“A court . . . is entitled to look at a defendant’s motive in committing a crime. Thus a murder may be viewed as more serious when committed pursuant to a contract.”).

182. SRA Legislative History, *supra* note 5, at 75.

183. *Id.* at 170.

184. *Id.*

185. *Id.*

186. *Id.*

187. 28 U.S.C. § 994(c)(3) (2012); see also SRA Legislative History, *supra* note 5, at 76.

The actual or intended qualitative impact of the harm on the victim(s)¹⁸⁹

Whether the offense was particularly heinous¹⁹⁰

The public response to and the frequency of the offense type, including the community view of the gravity of the offense,¹⁹¹ the public concern generated by the offense,¹⁹² and the current incidence of the offense in the community and in the Nation as a whole¹⁹³

The offender's criminal history, including:¹⁹⁴

The number of prior criminal acts¹⁹⁵

The seriousness of such acts¹⁹⁶

The remoteness or recentness of such acts¹⁹⁷

Offender's characteristics:

Degree of dependence upon criminal activity for a livelihood¹⁹⁸

Age; an elderly and infirm defendant is a mitigating factor¹⁹⁹

Mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant²⁰⁰

Post-Offense behavior:

The offender's acceptance of responsibility,²⁰¹ including the offender's amenability to available rehabilitative programming which may include evidence of completion of any post-offense rehabilitative programming²⁰²

Obstruction of justice²⁰³

A judge shall consider the following offender factors only for purposes of determining the appropriate sentencing form:

188. 28 U.S.C. § 994(c)(3).

189. See *supra* notes 169–172 and accompanying text; see 2016 U.S.S.G., *supra* note 41, § 2B1.1 cmt. n.3(A).

190. SRA Legislative History, *supra* note 5, at 170.

191. 28 U.S.C. § 994(c)(4).

192. *Id.* § 994(c)(5).

193. *Id.* § 994(c)(7).

194. *Id.*

195. SRA Legislative History, *supra* note 5, at 174.

196. *Id.*

197. *Id.*

198. 28 U.S.C. § 994 (d)(11).

199. *Id.* § 994(d)(1).

200. *Id.* § 994(d)(4).

201. See 18 U.S.C. § 3553(f)(5) (2012).

202. 2016 U.S.S.G., *supra* note 41, § 3E1.1 cmt. n.1 (asserting that acceptance of responsibility includes “post-offense rehabilitative efforts (for example, counseling or drug treatment)”).

203. See, e.g., 18 U.S.C. §§ 1503, 1505, 1510–15 (2012).

Education, vocational skills, and previous employment record only for the purpose of determining whether probation may be an appropriate sentence, and not for purposes of supporting a sentence of imprisonment or determining the length of a sentence of imprisonment²⁰⁴

Family ties and responsibilities and community ties only for the purpose of determining, if imprisonment is recommended, the location of the prison facility, the use of furlough, and the location of pre-custody release²⁰⁵

Physical condition, including drug dependence only for the purpose of determining whether treatment may be included as part of an appropriate sentence, and not for purposes of supporting a sentence of imprisonment or determining the length of a sentence of imprisonment²⁰⁶

Age, only for an elderly and infirm defendant, if a form of punishment such as home confinement might be equally efficient as and less costly than incarceration²⁰⁷

Another component of the sentencing worksheet, the statutory overrides, will be explained below.²⁰⁸

It is worth noting that the process discussed herein—the use of offense grades to identify the relative seriousness of the offense and the use of factors to determine an individualized sentence—is akin to the current Guidelines system which requires judges to look first to the base offense level, corresponding with the offense of conviction, and then to make adjustments based on specific offense characteristics corresponding with the real offense conduct. Accordingly, this Article maintains one of the major policy choices of the Guidelines: a modified charged-offense system. The initial Commission struggled with whether to adopt a real-offense or charged-offense approach; a draft of the Guidelines used a pure real-offense system but moved to a modified charged-offense system.²⁰⁹ While there are admitted problems with the selected approach, there are problems with any sentencing system whether pure real-offense, pure-charged offense, or a hybrid.²¹⁰

In the end, this Article agrees with the Commission's ultimate decision that drawing on both real offense and charged offense is most appropriate: the charge (what the offender is convicted of doing) assures that those convicted of the same offense receive similar sentences, and the real offense

204. SRA Legislative History, *supra* note 5, at 174.

205. *Id.*

206. *Id.* at 173.

207. 2016 U.S.S.G., *supra* note 41, § 5H1.1.

208. *See infra* Part IV.G.

209. *See* Nagel, *supra* note 51, at 925–26.

210. *See* Wilkins, *supra* note 111, at 576–77.

(what the offender did) allows for adjustments to ensure that the sentence is particular to the offender.

E. Aggravating Factors Must Be Proved to a Jury Beyond a Reasonable Doubt

The Sixth Amendment establishes the right to a jury trial in criminal cases.²¹¹ The Supreme Court has interpreted the Sixth Amendment to require a jury to find, beyond a reasonable doubt, any fact that results in a sentencing enhancement, unless the fact is the fact of a prior conviction²¹² or the fact was admitted by the defendant.²¹³ In *Booker*, the Court held that the Guidelines violated the Sixth Amendment because the Guidelines permitted a judge, not a jury, to find a fact (other than a prior conviction and other than what was admitted by the defendant) that enhanced a sentence.²¹⁴

This Article asserts that a judge may base a sentencing enhancement, other than the two traditional exceptions, only on aggravating facts that have been proven to a jury beyond a reasonable doubt.²¹⁵ This rule reinforces the Constitution, arms defendants with added protection, puts the onus on the government to prove aggravating facts as it already does at the conviction stage, and provides a jury-based limit on what a judge may consider in enhancing an offender's sentence, thus minimizing unwarranted factual variations and unwarranted sentencing disparities. An important consequence of this rule is that acquitted conduct—that which forms part of the real-offense conduct but has not been proven to a jury beyond a reasonable doubt²¹⁶—could not be used by a judge to enhance a sentence.²¹⁷ This is not an abstract rule: post-*Booker* experimentation with such a rule at the state level has been successful.²¹⁸

211. U.S. CONST. amend. VI.

212. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *see also* *Ring v. Arizona*, 536 U.S. 584, 602 (2002).

213. *Blakely v. Washington*, 542 U.S. 296, 303 (2004).

214. *United States v. Booker*, 543 U.S. 220, 244 (2005).

215. Such proof to a jury could take place either at trial or a post-conviction proceeding. *See* *United States v. Booker*, 375 F.3d 508, 514 (7th Cir. 2004) (Posner, J.), *aff'd and remanded*, 543 U.S. 220 (2004).

216. In *Jones v. United States*, for example, the district court enhanced the defendants' sentence for drug distribution on the basis of facts related to the defendants' drug conspiracy conduct, even though the jury acquitted the defendants of the drug conspiracy charge. 135 S. Ct. 8, 8–9 (2014) (Scalia, J., dissenting from the denial of certiorari) (expressing concern that the use of acquitted conduct in this fashion violates the Sixth Amendment).

217. *See generally* *United States v. Mateo-Medina*, 845 F.3d 546, 554 (3d Cir. 2016) (“[C]alculating a person's sentence based on crimes for which he or she was not convicted undoubtedly undermines the fairness, integrity, and public reputation of judicial proceedings.”).

218. *See* Sessions, *supra* note 60, at 352–53.

As this Article's proposal would comport with the Sixth Amendment, it averts the constitutional problem found in *Booker*, and it can retain the binding nature of the original Guidelines. Sentencing policies that are binding on judges would reduce disparities,²¹⁹ the primary goal of having sentencing guidelines in the first place.²²⁰

F. Appellate Review for Sentences Outside of the 25% Range Would Be Meaningful

Appellate courts can play an important supervisory role in an effective sentencing system. That is, appeals courts can facilitate guidelines compliance and sentencing consistency by reversing improper sentencing decisions and even by the mere threat of reversal.²²¹ For appeals courts to effectively induce compliance and reduce disparities, however, appellate review must have some teeth. As noted above, appellate review under the current Guidelines system is modest.²²²

This Article contemplates that sentences issued within the 25% range would be reviewable only for very limited reasons: to ensure that judges referenced the correct statutory grade; that judges used aggravating and mitigating factors only from the prescribed list; and that judges otherwise complied with statutory and constitutional commands. In addition to these technical questions, an appellate court also could inquire as to whether the district court's sentence is consistent with the purposes of punishment, as explained in *infra* Part IV.E.

If a sentence is imposed outside of the 25% range, however, this Article envisions that appellate review would be robust. In particular, for these departures, appellate courts would ask, in addition to the aforementioned questions, whether there is a sufficient basis in evidence for the sentencing court's determination that a factor is present to an unusual degree to warrant a departure.²²³ The onus would be on the judge to justify, on the record, the basis for the departure and the appellate review of these out-of-range sentences would be anything but a rubberstamp.²²⁴

219. *See supra* Part III.E.

220. *See supra* note 36.

221. *See* Stephanos Bibas et al., Essay, *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1371 (2009).

222. *See supra* Part III.F.

223. *Cf.* Judge Pryor's Response, *supra* note 63, at 278-79 (calling for "presumptive" guidelines in which a sentencing judge would need a "substantial and compelling" reason to depart).

224. *Cf. id.* at 279 (proposing that appellate review "not only would assure correct calculations of the guidelines and promote consistency in their application but also would assure that downward departures did not occur without substantial and compelling reasons.").

G. The Purposes of Punishment Would Be Coordinated

The original Commission ran out of time to pursue a multipurpose Guidelines system and, for expedient and political reasons, opted for a Guidelines system based on past practice.²²⁵ This Article seeks to accomplish what the initial Commission failed to do: develop a hybrid approach to sentencing that gives meaning to each of the traditional reasons for punishment.²²⁶ This subpart spells out the specific roles retribution, rehabilitation, incapacitation, and deterrence play in the Article's proposed sentencing model.

1. Retribution

The grade of the offense is the first factor for judges to consider in the sentencing process. The grade signals Congress's view as to the seriousness of the offense,²²⁷ and offense seriousness corresponds with the retributive purpose of punishment.²²⁸

A recent amendment to the Model Penal Code affirms that retribution supplies the primary justification for modern sentencing.²²⁹ The Model Penal Code identifies retributive considerations—“the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders”—as the primary justification for punishment.²³⁰ The American Law Institute's (“ALI”) effort to coordinate the reasons for punishment is especially remarkable because this specific amendment was the ALI's first amendment to the Model Penal Code in almost fifty years.²³¹

Even though our criminal justice system is predicated on retributive considerations, retribution cannot operate on its own. For starters, neither Congress²³² nor the Commission²³³ has selected retribution as the sole purpose of federal punishment.

225. See *supra* note 54 and accompanying text.

226. See Nagel, *supra* note 51, at 918 (asserting “[t]he Commission planned to create guidelines “consistent with the statutory mandate for a multipurpose amalgam”).

227. See SRA Legislative History, *supra* note 5, at 51.

228. See Joshua Dressler, *The Wisdom and Morality of Present-Day Criminal Sentencing*, 38 AKRON L. REV. 853, 860 (2005).

229. MODEL PENAL CODE § 1.02(2)(a)(i) (AM. LAW INST., Tentative Draft No. 1, 2007).

230. *Id.*

231. This Article's endorsement of retribution is supported by recent research suggesting that retribution can reflect community views of the seriousness of punishment, can thereby bring moral credibility to punishment, and can thereby further crime control considerations. See Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565 (2017).

232. See 18 U.S.C. § 3553(a)(2) (2012) (listing the purposes of punishment on an equal basis).

233. See Breyer, *supra* note 54, at 17; Nagel, *supra* note 51, at 930–31.

In addition, the Nation's experience with retribution indicates that it cannot alone dictate sentencing outcomes. At present, punishment is largely retributive: offenders encounter long sentences, are effectively warehoused, and are provided with little support to improve their capacity to live within the bounds of the law upon release.²³⁴ As a result, the criminogenic needs of inmates are allowed to fester, inmates are left further unprepared for productive living in society, and they are more inclined to return to lives of criminality.²³⁵ To make matters worse, supervised release similarly tends to focus on revocation of probationary status as opposed to supporting the ex-inmate.²³⁶

Data bears out this reality in striking terms. Almost all inmates in federal custody will be released back into their communities.²³⁷ Of these re-

234. See *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) (“Persons are sent to prison as punishment, not for punishment.”); Obama, *supra* note 79, at 812 (“[Our criminal justice system] takes young people who made mistakes no worse than my own and traps them in an endless cycle of marginalization and punishment.”); J.C. Oleson, Comment, *The Punitive Coma*, 90 CALIF. L. REV. 829, 841–42 (2002) (“Contemporary prison policy, freed of its commitment to rehabilitation, either emphasizes retribution, reinvigorating such archaic practices as chain gangs and public shaming, or emphasizes no-frills incapacitation. . . . [W]e simply warehouse our incarcerated population.” (footnotes omitted) (citation omitted) (citing Rick Bragg, *Chain Gangs to Return to Roads of Alabama*, N.Y. TIMES, Mar. 26, 1995, at 7; Mireya Navarro, *Florida Prisons to Revive Using Chain Gangs—But with Limits*, S. F. CHRON., Nov. 21, 1995, at A7)); James M. Byrne, A Review of the Evidence on the Effectiveness of Alternative Sanctions and an Assessment of the Likely Impact of Federal Sentencing Guideline Reform on Public Safety: Summary of Testimony 19 (July 10, 2009), <http://faculty.uml.edu/jbyrne/documents/A-Review-of-the-Evidence-on-the-Effectiveness-of-Alternative-Sanctions-and-an-Assessment-of-.pdf>. (“[T]here is no methodologically rigorous evidence that incarceration reduces an offender’s risk of re-offending upon return to the community; in fact . . . prisoners actually re-offend at a higher rate.”).

The retributive nature of prison is exemplified by attitudes towards prison rape. Some are indifferent to, or even accepting of, prison rape on the ground that inmates “deserve” to be raped. See U.S. DEP’T OF JUSTICE, REVIEW PANEL ON PRISON RAPE, REPORT ON SEXUAL VICTIMIZATION IN PRISONS AND JAILS 48 n.494 (G. J. Mazza ed., 2012), http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_2012.pdf (“National studies have found that a significant number of correctional officers believe that homosexual inmates should not be protected from rape or that if homosexual inmates are raped, they got what they deserved.”).

235. Contributing to the retributive way in which inmates serve their punishment is the public’s ability or preference to disassociate itself from inmates. See *Johnson v. Phelan*, 69 F.3d 144, 152 (7th Cir. 1995) (Posner, C.J., dissenting) (“[W]e should have a realistic conception of the composition of the prison and jail population before deciding that they are a scum entitled to nothing better than what a vengeful populace and a resource-starved penal system choose to give them. We must not exaggerate the distance between ‘us,’ the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.”).

236. See Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. REV. RES. 479, 508 (1999) (“[P]arole supervision has been transformed ideologically from a social service to a law enforcement system. Just as the prison system responded to the public’s demands for accountability and justice, so did parole officers.”).

237. Of the 171,491 federal inmates, only 4,792 (or 2.79%) were sentenced to life or death. Sentences Imposed, FED. BUR. PRISONS,

leased inmates, a significant number of ex-offenders recidivate, or break the law again and impose new harms on new victims. In a comprehensive study, the Commission found that, of 25,431 federal offenders released from prison in 2005, almost half were rearrested and almost a third were reconvicted; most recidivated within just two years of release.²³⁸

A purely retributive system would tolerate, if not facilitate, these post-release harms. Society pays for a purely retributive system both in terms of suffering additional injuries and incurring additional expenditures when the offender invariably revolves back into the criminal justice system.²³⁹ If society has an interest in reducing the likelihood of subsequent harm and protecting potential victims,²⁴⁰ it cannot concern itself only with punishing the offender for what they did in the past.²⁴¹ As one judge put it, a sentencing “judge cannot close his or her eyes” to how punishment is carried out.²⁴² Instead, the judge has a “responsibility and power to ensure that the sentence is carried out in a civilized way.”²⁴³

2. Rehabilitation

A sovereign cannot, at sentencing, go back in time to change the circumstances giving rise to the criminal behavior.²⁴⁴ But with an offender in its custody, the state does have the opportunity to ensure that the programmatic needs of the offender are addressed such that the offender can stand a

https://www.bop.gov/about/statistics/statistics_inmate_sentences.jsp (last updated Jan. 27, 2018). In other words, 97.21% of federal inmates can return to society.

238. U.S. SENTENCING COMM’N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 5 (2016).

239. See generally Brad Parks, *How to Fix America’s Mass Incarceration Problem*, N.Y. POST (Nov. 1, 2015, 6:00 AM), <http://nypost.com/2015/11/01/how-to-fix-americas-mass-incarceration-problem> (explaining how the attitude that a criminal deserves to do his or her time, without thinking about his or her reentry, “really just shoots all of society in the foot.” (quoting Shadd Maruna, Dean of the Rutgers School of Criminal Justice)).

240. See Wilkins et al., *supra* note 76, at 305 (“In the 1970’s, members of the public and Congress denounced the ineffectiveness of the ‘revolving-door’ criminal justice system. Offenders often were incarcerated, deemed rehabilitated, and released only to start the cycle anew.”); see also *United States v. Salerno*, 481 U.S. 739, 755 (1987) (identifying “a concern for the safety and indeed the lives of its citizens” as a “primary concern of every government”); *id.* at 750 (identifying “the Government’s general interest in preventing crime” as “compelling”).

241. See *United States v. D.W.*, 198 F. Supp. 3d 18, 23 (E.D.N.Y. 2016) (“Sentencing is not merely an announcement of judgment. It is a prediction and assumption of how the sentence will be carried out.”).

242. *Id.*

243. *Id.* at 146.

244. See Alan Feuer, *Federal Judge Urges U.S. to ‘Jettison the Madness of Mass Incarceration’*, N.Y. TIMES (June 23, 2016), <http://www.nytimes.com/2016/06/24/nyregion/federal-judge-urges-us-to-jettison-the-madness-of-mass-incarceration.html> (“So many defendants I see are without schooling, skills, hope or direction, and no term of years is going to change that.” (quoting United States District Judge Raymond J. Dearie)).

better chance of living crime-free once released. As one United States Attorney noted, “[w]e can look at ex-offenders returning to our communities as a risk, or we can help give them that chance. The potential rewards for their lives, for the economy and for our safety are incalculable.”²⁴⁵

A sentence, therefore, should be designed to successfully reintegrate the offender into society.²⁴⁶ Accordingly, punishment should entail not only the withdrawal of the offender’s liberty, but also a practical imperative to mitigate future harm. This may be furthered by providing offenders with proven methods, such as mental health services, educational instruction, skills training, and mentorship.²⁴⁷ Proven methods are those rehabilitative programs based in evidence²⁴⁸ and shown to reduce the likelihood of recidivism.²⁴⁹ Methods that have the opposite effect should be scrapped.²⁵⁰ This

245. Paul J. Fishman, *Ex-Offenders Get Time, Now They Need Opportunity*, NJ.COM (July 16, 2014, 8:00 AM), http://www.nj.com/opinion/index.ssf/2014/07/post_24.html.

246. The societal interest in the offender’s success does not end at release. Former Treasury Secretary Robert Rubin offers a useful five-point blueprint to enhance the offender’s prospects for a post-release, crime-free life. See Robert E. Rubin, *The Smart Way to Help Ex-Convicts, and Society*, N.Y. TIMES (June 3, 2016), <http://www.nytimes.com/2016/06/03/opinion/how-to-make-mass-incarceration-end-for-good.html>. Secretary Rubin’s proposal should be contrasted with the current system in which an ex-offender is given very little support. See *id.* (“How is giving a former inmate \$200 and not much else—no suitable place to live, no help finding work, no help adjusting to life outside prison walls—preparing him for a productive life?”).

247. As the head of one re-entry organization notes, “[a]n investment in people, even formerly incarcerated individuals, offers such a great return in a variety of places, from a public safety aspect They can earn money and in turn start paying taxes and give back to a community. They can get engaged with their children and break that cycle of crime.” Jim Barnes, *Reentry Groups Invest in Ex-Inmates to Break the Cycle of Crime*, WASH. POST (Mar. 2, 2016), https://www.washingtonpost.com/local/reentry-groups-invest-in-ex-inmates-to-break-the-cycle-of-crime/2016/03/01/ce27c0c0-db11-11e5-891a-4ed04f4213e8_story.html (quoting Derwin Overton, Executive Director of Opportunities, Alternatives and Resources). Further, inmates have significant mental health needs. See Obama, *supra* note 79, at 849 (“Nationwide, slightly more than one in twenty individuals have some form of mental illness. In 2005, more than half of the incarcerated population did.”).

248. See Colleen Walsh, *The Costs of Inequality: A Goal of Justice, a Reality of Unfairness*, HARV. GAZETTE (Feb. 29, 2016), <http://news.harvard.edu/gazette/story/2016/02/the-costs-of-inequality-a-goal-of-justice-a-reality-of-unfairness/> (“The disparity concerns of 20 years ago were not illegitimate, but the way to deal with disparity in sentencing is by coming up with programs that we have validated and tested, programs that we have legitimized Going forward, we have to look at things differently.”(quoting retired United States District Judge Nancy Gertner)).

249. In one of his last opinions as a United States District Judge, John Gleeson provided an example of an offender who successfully completed a “no-entry” court for a drug trafficking offense, and in doing so avoided prison, avoided a felony record and the collateral consequences of that record, and avoided imposing significant financial costs on the system. *United States v. Dokmeci*, No. 13-CR-00455 (JG), 2016 WL 915185, at *3–4 (E.D.N.Y. Mar. 9, 2016).

250. To fulfill the objective of preparing inmates for a lawful post-release existence, the criminal justice system, including prisons, may need to curb if not eliminate practices, such as solitary confinement, that may tend to calcify criminogenic qualities or push the inmate further away from social situations that would otherwise facilitate a healthy and sustained transition into his or her community. See generally Alex Kozinski, *Worse than Death*, 125 YALE L.J. F. 230, 231–35 (2016) (describing the effects of solitary confinement); Kevin Johnson, *More Than a Decade After*

is not an aspirational, idealistic possibility: proven models already exist at state and local levels, and even internationally,²⁵¹ for supportive incarceration that yields decreased recidivism, and does so at lower costs.²⁵² Federal sentencing should take its cue from these demonstrably effective programs.²⁵³ As then-President Obama stated in his much-discussed *Harvard Law Review* article, “inmates who participate in correctional education programs have significantly lower odds of returning to prison than those who

Release, They All Come Back, USA TODAY (Nov. 4, 2015), <https://www.usatoday.com/story/news/nation/2015/11/04/solitary-confinement-prisoners-impact/73830286/> (tracking nine offenders subject to solitary confinement, all of whom recidivated and returned to prison).

251. See Nicholas Turner & John Wetzel, Opinion, *Treating Prisoners with Dignity Can Reduce Crime*, NAT’L J. (May 22, 2014), <https://www.nationaljournal.com/s/57245>; Keramet Reiter et al., *Denmark Doesn’t Treat Its Prisoners Like Prisoners—and It’s Good for Everyone*, WASH. POST (Feb. 2, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/02/02/denmark-doesnt-treat-its-prisoners-like-prisoners-and-its-good-for-everyone/> (“Recidivism is . . . relatively low among released Danish prisoners, hovering around 27 percent, half of the average recidivism rates reported across various U.S. jurisdictions.”); Nicholas Turner & Jeremy Travis, *What We Learned from German Prisons*, N.Y. TIMES (Aug. 6, 2015), <https://www.nytimes.com/2015/08/07/opinion/what-we-learned-from-german-prisons.html>; *60 Minutes: Privacy, Weekend Leave, Keys . . . This Is Prison?* (CBS television broadcast Apr. 3, 2016), <http://www.cbsnews.com/news/60-minutes-germany-prisons-crime-and-punishment>.

252. See, e.g., LOIS M. DAVIS ET AL., RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS xvi (2013) (finding that educational programming resulted in a 43% reduction in recidivism); Stephen J. Steurer & Linda G. Smith, *Education Reduces Crime: Three-State Recidivism Study Executive Summary*, CORRECTIONAL EDUC. ASS’N (Feb. 2003), <http://www.ceanational.org/PDFs/EdReducesCrime.pdf> (reporting a 37.8% reduction in recidivism for program participants); Office of Justice Programs, *Program Profile: Project BUILD*, NAT’L INST. OF JUST. (Dec. 30, 2013), <https://www.crimesolutions.gov/ProgramDetails.aspx?ID=335> (examining an education-focused program with a 24% reduction in recidivism); Office of Justice Programs, *Practice Profile: Incarceration-Based Therapeutic Communities for Adults*, NAT’L INST. OF JUST., <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=52> (last visited Oct. 2, 2017) (analyzing a substance abuse program in which participants are 1.38 times less likely to recidivate); see also Rachel E. Barkow, *Life Without Parole and the Hope for Real Sentencing Reform*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY? 190, 199 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (“[T]he consensus now seems to be that while certain treatments (either alone or in combination) lower rates of recidivism, recidivism remains relatively high even after treatment.”); Mark W. Lipsey & Francis T. Cullen, *The Effectiveness of Correctional Rehabilitation: A Review of Systematic Reviews*, 3 ANN. REV. L. & SOC. SCI. 297, 303 tbl.2 (2007) (including studies suggesting that rehabilitation can reduce recidivism).

253. The federal approach is in need of improvement. See DAVID RAUMA, FED. JUDICIAL CTR., EVALUATION OF A FEDERAL REENTRY PROGRAM MODEL 2, 36–37 (2016) (showing no statistical difference in recidivism rates between inmates who participated in a reentry program and those who did not). The federal system can draw on successful models, avoiding those that do not work. See, e.g., Corinne Ramey, *As Boot-Camp Prisons Fade, New York Inmates March On*, WALL ST. J. (Aug. 1, 2016), <http://www.wsj.com/articles/boot-camp-prison-find-their-time-running-out-1469979345> (stating that boot-camp prisons have “no notable impact on recidivism”).

do not, and that every dollar spent on prison education saves four to five dollars on the cost of reincarceration.”²⁵⁴

As an offender’s sentence should be calculated to assist the offender’s return to society without imposing additional harms on new victims, some may object to this revitalized focus on rehabilitation because of the view, grounded in past experiences, that rehabilitation does not work.²⁵⁵ It is because of this same perception that critics may not have confidence that programmatic efforts can do anything to reduce recidivism rates. It is true that rehabilitation, while once prominent in the American criminal justice system, has faded as a core purpose of punishment in federal law.²⁵⁶ It also is true that the framers of the SRA were highly skeptical of rehabilitation.²⁵⁷ But rehabilitation remains a codified purpose of punishment,²⁵⁸ and recent rehabilitative efforts suggest that carefully tailored rehabilitative efforts can demonstrably reduce recidivism rates.²⁵⁹ If the objectives of the criminal justice system include the reduction of future harm and ensuring that offenders leave the criminal justice system without reoffending, these recent efforts, and therefore rehabilitation in general, cannot be cast aside wholesale due to historic underperformance.²⁶⁰

At a deeper level, this Article is unprepared to dismiss all offenders as beyond improvement.²⁶¹ As Justice Anthony Kennedy has stated, we must “bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million

254. Obama, *supra* note 79, at 831–32.

255. See Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974) (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”); Nagel, *supra* note 51, at 928 n.237.

256. See *Tapia v. United States*, 564 U.S. 319, 324 (2011).

257. See SRA Legislative History, *supra* note 5, at 38 (calling rehabilitation an “outmoded” model of criminal justice); *id.* (“[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting, and it is now quite certain that no one can really detect whether or when a prisoner is rehabilitated.”); see also Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 951 (1995) (“The legislative history of the Sentencing Reform Act . . . reveals the abandonment of the rehabilitative model in favor of the just deserts philosophy.” (footnote omitted)).

258. See *United States v. Flowers*, 983 F. Supp. 159, 165 (E.D.N.Y. 1997) (“With the advent of the Federal Sentencing Guidelines it has been argued that rehabilitation has a subsidiary role compared to deterrence and just desert punishment as rationales for sentencing. . . . This view is mistaken. Rehabilitation is still a fundamental consideration for federal sentencing” (citation omitted) (citing Bunzel, *supra* note 257, at 951)).

259. See *supra* note 252.

260. See Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991).

261. Cf. *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (holding that life without parole for juvenile offenders ignores the capacity of juveniles to change and is appropriate only for those “who have shown an inability to reform”).

inmates in the United States are human beings whose minds and spirits we must try to reach.”²⁶² Then-Judge Alex Kozinski similarly shared his view that offenders are not “inevitably evil” or “forever evil,” lamenting that this perspective “seems to be dwindling.”²⁶³

Some also may charge that this Article would dramatically rework the current operation of federal prisons. But the notion that we should pay greater attention to the manner of incarceration is not new or novel.²⁶⁴ Others have argued that American prisons can change if they are properly incentivized to provide programmatic support in order to reduce recidivism.²⁶⁵ In 2016, the Department of Justice took note, proposing that, “[u]pon incarceration, every inmate should be provided an individualized reentry plan tailored to his or her risk of recidivism and programmatic needs.”²⁶⁶ Also, according to the Department, “[w]hile incarcerated, each inmate should be provided education, employment training, life skills, substance abuse, mental health, and other programs that target their criminogenic needs and maximize their likelihood of success upon release.”²⁶⁷ These principles, if implemented, would require adjustments as to how federal prisons operate.²⁶⁸

How would retribution mesh with rehabilitation, as both seem at odds? This Article recognizes retribution as the leading reason for *why* we punish, but rehabilitation as the leading reason for *how* we punish. Indeed, an inmate shall not be released until an official determination is made that the

262. Justice Kennedy’s Speech, *supra* note 81.

263. Charles Koch Institute, *Is There Room For Forgiveness in Criminal Justice?*, YOUTUBE (Nov. 11, 2015), <https://youtu.be/icUPo-7pUDc>.

264. See Justice Kennedy’s Speech, *supra* note 81. As Justice Kennedy explained,

The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case.

When the door is locked against the prisoner, we do not think about what is behind it.

Id.; see *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977) (“It is incumbent on the incarcerating body to provide the individual with a healthy habitative environment. Anything less would be to subject the individual to further punishment than was given by the sentencing trial court.”).

265. See, e.g., Kenneth L. Avio, *On Private Prisons: An Economic Analysis of the Model Contract and Model Statute for Private Incarceration*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 265 (1991); Francis T. Cullen et al., *The Accountable Prison*, 28 J. CONTEMP. CRIM. JUST. 77 (2012); Alexander Volokh, *Prison Accountability and Performance Measures*, 63 EMORY L.J. 339 (2013).

266. U.S. DEP’T OF JUSTICE, ROADMAP TO REENTRY: REDUCING RECIDIVISM THROUGH REENTRY REFORMS AT THE FEDERAL BUREAU OF PRISONS 3 (2016) (emphasis omitted), <https://www.justice.gov/reentry/file/844356/download>.

267. *Id.* (emphasis omitted).

268. See *supra* notes 266–267 and accompanying text.

offender can live in mainstream society on a lawful basis.²⁶⁹ This requirement takes seriously the interest in reducing additional harms and incentivizes offender compliance with the provided plan. As one federal district court judge has argued, federal inmates are not incentivized “to take advantage of work or study opportunities” in the current prison system.²⁷⁰

A structural change would help promote the rehabilitative way in which punishment would be carried out. To further the rehabilitative execution of punishment, the Bureau of Prisons, which administers the federal prisons, should be extracted from the Department of Justice. This is for at least two reasons. First, it may not be sensible for the Bureau of Prisons to operate within the same administrative culture as Department prosecutors, whose interests are served through longer sentences in harsher conditions of confinement.²⁷¹ Second, the results of a punitive approach, with little apparent interest in ensuring that inmates are prepared for post-release life, are high recidivism rates, additional crime, and additional expenditures to prosecute and punish secondary harms.

If the Bureau of Prisons were to be taken out of the Department of Justice, the question becomes: Where should it be placed? An answer may be the federal judiciary. For starters, the Sentencing Commission is an independent agency within the federal judiciary. The Supreme Court blessed Congress’s creation of this agency in the federal courts.²⁷² Just as the Commission sets sentencing policy for federal judges, the United States Corrections Commission could set corrections policy for the institutions to which federal judges remand federal inmates. This expert body may help ensure that inmates are provided with evidence-based rehabilitative pro-

269. See United States Parole Comm’n Manual, 28 C.F.R. § 2.18 (2016) (explaining that parole will be granted if “release would not jeopardize the public welfare (i.e., that there is a reasonable probability that, if released, the prisoner would live and remain at liberty without violating the law or the conditions of his parole).”).

270. Stefan R. Underhill, *Did the Man I Sentenced to 18 Years Deserve It?*, N.Y. TIMES (Jan. 23, 2016), <http://www.nytimes.com/2016/01/24/opinion/sunday/did-i-sentence-a-murderer-or-a-cooperative-witness.html>.

271. See Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 320 (2013). Barkow writes:

The BOP is poorly positioned to be an independent voice on corrections because its officials must speak through DOJ, which deemphasizes corrections concerns, including rehabilitation and reentry, in favor of prosecutors’ interests, which are to maintain longer sentences on the books and sufficiently harsh conditions of confinement so that prosecutors maintain the bargaining leverage that allows them to obtain pleas so easily. . . . Prosecutors care more about how punishment can help them win cases and be used to lock up people they view as dangerous. They are institutionally poorly situated to think about what happens after someone is sentenced and what inmates need to reenter society when that sentence is up.

Id.

272. See *Mistretta v. United States*, 488 U.S. 361, 374 (1989).

gramming calculated to ensure inmates' successful transition to life outside of prison. The federal judiciary already encompasses other actors in the sentencing and corrections arena, including judges (of course) and probation officers, who prepare PSRs and monitor inmates' compliance with conditions of supervised release. As federal judicial actors are involved in incarceration at the front-end sentencing phase and the back-end post-release phase, federal judicial actors may be involved in the middle phase of custody as well.

3. *Incapacitation*

Should an inmate remain in custody beyond any time justified by retributive purposes, the duration of the inmate's sentence would be justified by a need to incapacitate the offender, that is, to keep them from society. An offender in this situation has failed to internalize programmatic support such that they cannot return to society without posing an unacceptable risk of recidivism and posing a threat to public safety. To be sure, such post-retributive custody may, but need not, take place in prison. Depending on the circumstances of the offender and, in particular, the degree to which the offender is prepared to live crime-free in society, the offender may be placed in alternative correctional settings.

While this Article accepts the finding of the Model Penal Code ("Code") that retribution is the leading purpose of punishment, this Article does depart from the Code in another respect. The Code requires utilitarian considerations to be deployed within the bounds of retributive considerations.²⁷³ This Article, by contrast, permits an offender to be punished beyond what is justified on retributive grounds if the offender is not prepared for release back into the community. That is, under this Article, after the point at which punishment can no longer be supported on the basis of the offender's desert, an offender could still be incapacitated. In this Article's view, it is better to ensure, as a practical matter, that the offender is able to return to society without re-offending and thus introducing additional costs to society, than to ensure, as a formal matter, that retribution governs other sentencing goals.

4. *Deterrence*

This leaves deterrence, both specific and general. Deterrence remains a legitimate purpose of punishment, one that continues to enjoy codified status.²⁷⁴ There are, however, two major issues with respect to the meaningful incorporation of deterrence in a sentencing scheme.

273. See MODEL PENAL CODE § 1.02(a)(ii) (AM. LAW INST., Tentative Draft No. 1, 2007).

274. 18 U.S.C. § 3553(a)(2)(B) (2012).

Deterrence is the prospective offender and society's assessment of the cost of criminal behavior.²⁷⁵ That is, under deterrence theory, the prospective criminal will consider the gains of criminal behavior against the probability of punishment; the latter should outweigh the former and, thus, dissuade the prospective offender and other individuals from pursuing the contemplated criminal action.²⁷⁶ As scholars have recognized, deterrence involves much more than a simple binary assessment of potential rewards against potential punishment. Under more developed notions of deterrence, a prospective criminal will consider possible gains against the combined probabilities of four countervailing factors: the probability of detection, the probability of prosecution, the probability of conviction, and the probability of punishment.²⁷⁷

The first relevant problem with respect to deterrence is that a sentencing judge can realistically impact only one of the four probabilities cutting against criminality, that is, the probability of punishment.²⁷⁸ The second problem is that, even with respect to the limited factor of probability of punishment, the deterrent effect of sentences is very much in doubt.²⁷⁹ What is well-established is that any deterrent effect of punishment fades over time because individuals focus more on the immediate loss of liberty than the loss of liberty down the road.²⁸⁰ Put simply by Third Circuit Judge Stephanos Bibas, "a day of freedom today is worth more than a day of freedom ten years from now."²⁸¹

275. See Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2387 (1997) ("[C]riminal law can be seen as setting prices for crimes.").

276. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968) ("[W]hen other variables are held constant, an increase in a person's probability of conviction or punishment if convicted would generally decrease . . . the number of offenses he commits.").

277. See Richard Craswell, *Deterrence and Damages: The Multiplier Principle and Its Alternatives*, 97 MICH. L. REV. 2185, 2211 (1999).

278. See Nagel & Swenson, *supra* note 111, at 220 (concluding that it would be unworkable for judges to take account of each of these probabilities, "however persuasive or noble the theory of optimal penalties was in the abstract").

279. Compare ROGER K. WARREN, CRIME & JUSTICE INST., NAT'L INST. OF CORR. & NAT'L CTR. FOR STATE COURTS, EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES 11 (2007) ("[I]ncarceration actually results in slightly increased rates of offender recidivism."), with Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 231 (2013) ("[U]nlike increments in long sentences, increments in short sentences do have a material deterrent effect on a crime-prone population.").

280. See Nagin, *supra* note 279, at 201 ("[T]here is little evidence that increases in the length of already long prison sentences yield general deterrent effects that are sufficiently large to justify their social and economic costs."); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1567-68 (1998) ("If the sentence is already long, any increments of length will have little weight in the criminal's calculations . . .").

281. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2504 (2004).

In consideration of the dubious status of deterrence, reflected in the two problems identified in modern deterrence theory, this Article does not assign an independent role to deterrence. But, because of the discounting of punishment over time, this Article assumes that any deterrent effect would be subsumed under punishments that would be justified on retributive grounds.

Prior to the Guidelines, an individual convicted of a federal offense could serve substantially less time than the imposed sentence.²⁸² If, for example, a defendant was sentenced to ten years in prison, the offender, the victim(s), and society would rightly expect the offender to be put away for roughly the sentenced term. But, with parole, the offender may be freed in five years. The sense, therefore, was that everyone, especially the victim, was duped by the sentence and the system in general.

The Guidelines promote “truth in sentencing,” or the assurance at the time of sentencing that the offender will serve the sentence imposed.²⁸³ The Guidelines did so by abolishing parole. In the Guidelines era, a victim and society know that a ten-year sentence effectively means the inmate will serve ten years. There is one exception: to incentivize compliance with prison regulations, an inmate can shave a maximum of fifteen percent off of his or her sentence for “good behavior.”²⁸⁴

This Article acknowledges the benefit of certain-sentencing for victims and others. But doing away with parole—basically doing away with ensuring that the offender is prepared to be reintegrated into society—is not the answer. In a determinate sentencing system, a judge imposes a sentence at time *X*, with the sentence to expire at time *Y*, but the judge at time *X* does not know what shape the defendant will be in at time *Y*, which may be years away.²⁸⁵ The defendant at time *Y*, as recidivism rates suggest, may not be

282. See U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SENTENCING AND TIME SERVED 4 tbl.3, <http://www.bjs.gov/content/pub/pdf/sts.pdf>; Nagel, *supra* note 51, at 884 (“[S]entences pronounced by the court were, with rare exception, never served: twelve years meant four, eighteen meant six, thirty meant ten. . . . [T]he public and the victim were duped by the sham. . . . Furthermore, [parole] served to perpetuate a system where the judge’s sanction was not dispositive.” (footnote omitted) (citing 18 U.S.C. §§ 4163, 4164, 4205 (repealed 1984))).

283. See Feinberg, *supra* note 36, at 296 (“[t]ruth in sentencing’ . . . encompass[es] reform initiatives aimed at replacing the indeterminate sentence (and parole release) with determinate sentencing.”).

284. See 18 U.S.C. § 3624(b) (2012); see also 2016 U.S.S.G., *supra* note 41, § 1A.3.

285. See *The Effect of United States v. Booker on the Federal Sentencing Guidelines: Hearing Before the U.S. Sentencing Comm.* 25 (Feb. 15, 2005) (statement of Paul G. Cassell, U.S. District J., District of Utah, Professor of Law, S.J. Quinney College of Law at the University of Utah) (“A judge cannot say today whether after completing, say, 100 months of his sentence, a defendant will have rehabilitated himself to the point where he is no longer a threat to society.”). Relatedly, Judge Posner has pointed out the folly of imposing, at the time of sentencing, conditions of supervised release, to be served at the time of release. See Richard A. Posner, *What Is Obviously Wrong With the Federal Judiciary, Yet Eminently Curable, Part I*, 19 GREEN BAG 2D 187, 193

ready to live crime-free in society, but will be released anyway due to the premium placed on offenders serving a fixed, certain prison term. In other words, to release the defendant at time *Y* would further certainty on the front end, but would sacrifice public safety on the back end.

This Article seeks to promote both certainty and public safety. Whereas parole in the pre-Guidelines system enabled a defendant to serve time *shorter* than the imposed sentences, under this Article an offender's served sentence would be no less than what retributive considerations would justify. In addition, under this Article, a defendant's served sentence would last until the defendant is ready to return to the community. Victims and society cannot claim to be duped under a scenario in which an offender serves a *longer* sentence than the retributive minimum.²⁸⁶ A sentence reflecting retributive considerations combined with determinations that an offender is prepared to live in society should reflect the concerns of victims and society, and also further crime control.

Moreover, to the extent that certainty remains a residual concern, existing parole guidelines provide definitive timelines for regular parole hearings.²⁸⁷ These periodic reviews obviate the possibility that the inmate will languish in prison without proper consideration. As to who will conduct these reviews, a traditional approach would be to entrust parole boards with this responsibility, as these boards made parole decisions prior to the abolishment of the practice in the federal system. An alternative would be to draw on the idea of a "second look," that is, conferring upon the sentencing judge the opportunity to assess the offender's suitability for release.²⁸⁸

(2016) ("Parole was sensibly based on observations of the convicted criminal's behavior in prison; if he behaved himself he could expect a shortened sentence plus a degree of supervision during the parole period. Under the regime of supervised release, the judge at sentencing decides what restrictions to impose when the inmate is released, yet without having a clear idea of what he'll be like when released, which may not be for many years.").

286. The uncertainty of release date also impacts inmates. See ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 102 (1st ed. 1976) ("[C]onvicted offenders . . . suffer the agonies of not knowing how long their punishments will continue."). In this Article's contemplated system, inmates sentenced to prison will know they will spend at least a defined period of time in prison, due to retributive considerations. Any remaining time beyond this period, justified on rehabilitative considerations, lies in the hands of the inmate and particularly their readiness for reintegration. They hold the keys to release.

287. See UNITED STATES PAROLE COMM'N, *RULES AND PROCEDURES MANUAL* § 2.12 (providing the rule for initial hearing), § 2.14 (providing the rule for subsequent hearings), § 2.26 (providing the rule for appeal), § 2.27 (providing the rule for petition for reconsideration).

288. See MODEL PENAL CODE § 305.6 cmt. (AM. LAW INST., Tentative Draft No. 2, 2011).

H. Statutory Overrides

The factors in this Article are necessarily subordinate to any statute.²⁸⁹ In particular, the factors must correspond with the following statutory directives:

1. Enhancements

First, the SRA requires the Commission to generally ensure a “first offender who has not been convicted of a crime of violence or an otherwise serious offense” *does not* receive a term of imprisonment, and an offender who is “convicted of a crime of violence resulting in serious bodily injury” *does* receive a term of imprisonment.²⁹⁰ Congress already has defined a “crime of violence.”²⁹¹ The question becomes: What is an “otherwise serious offense?”

An advantage of drawing upon statutory grades is that the response to this question can be rather straightforward: there can be no doubt that the highest-grade offenses are “serious.” To the extent that Congress seeks to ensure that offenses other than those labeled as Class A justify imprisonment, it can revise and add to the list accordingly.²⁹²

Second, the SRA instructs the Commission to ensure that a career offender receives “a term of imprisonment at or near the maximum term authorized”²⁹³ Similarly, the Armed Career Criminal Act,²⁹⁴ which specifies escalating statutory maximums,²⁹⁵ directs the Commission to ensure that a “substantial term of imprisonment” is imposed on an offender: (1) who has two or more prior felonies committed separately; (2) who committed the instant offense as part of a criminal livelihood; (3) who had a major role in a conspiracy involving racketeering activity; (4) who committed a crime of violence while on release pending a felony charge for which they were ultimately convicted; and (5) who trafficked a substantial quantity of a controlled substance.²⁹⁶ This Article does not define “substantial,” but again, the statutory maximum could be the reference point for offenses falling within one of these qualifying situations.

289. *See Stinson v. United States*, 508 U.S. 36, 45 (1993).

290. 28 U.S.C. § 994(j) (2012).

291. 18 U.S.C. § 16 (2012).

292. The SRA contemplates that the statutory classifications would be evolutionary or fluid in nature. *See SRA Legislative History*, *supra* note 5, at 87 (“The Committee intends that future legislation creating new federal offenses specify the grade for the offense.”).

293. 28 U.S.C. § 994(h); *see also* 2016 U.S.S.G., *supra* note 41, § 4B1.1(a).

294. 18 U.S.C. § 924(c).

295. That said, the Armed Career Criminal Act does mandate that sentences for violations of the Act be served consecutively, which can significantly enhance the duration of an offender’s sentence. 18 U.S.C. § 924(c)(1)(D)(ii).

296. 28 U.S.C. § 994(i).

2. *Reductions: Substantial Assistance and Safety Valve*

Congress provided for two major outlets for judges to depart downward from a mandatory minimum. First, the government may move for a sentence below a mandatory minimum to reward the offender's "substantial assistance in the investigation or prosecution of another person who has committed an offense."²⁹⁷ This substantial assistance provision would be unaffected by this Article's model: after the appropriate grade and associated range are identified, the government may still argue that the offender should receive a sentence below the statutory minimum to reflect the offender's help.

Second, Congress permitted a judge to impose a sentence below a mandatory minimum in a drug trafficking case if the offender satisfies five criteria: (1) they have no more than one criminal history point under the Guidelines; (2) they did not use or threaten violence, and did not possess a firearm or dangerous weapon; (3) death or serious bodily injury did not result from the offense; (4) they did not hold a major role in the offense and were not involved in a continuing criminal conspiracy; and (5) they cooperated.²⁹⁸ The proposal model does not affect criteria two through four, which are real offense characteristics, or five, which captures post-offense behavior. The first criterion is slightly impacted: as the model eschews the criminal history point system and the criminal history categories, the statutory safety value can apply under the model if the criteria justifying that one-point replace the one-point limitation. Thus the first criterion under the model would be, "an offender must not have a prior sentence exceeding sixty days."²⁹⁹

Accordingly, this Article's model is consistent with statutory provisions authorizing sentences below mandatory minimums, and accommodates common, accepted reasons for departures below the statutory minimum.

3. *Reduction: Fast-Track*

A statutorily mandated basis for a downward departure, which does not provide relief from a mandatory minimum, is an offender's participation in an "early disposition" program. In particular, through the enactment of the PROTECT Act, Congress directed the Commission to promulgate "a policy statement authorizing a downward departure of not more than 4 levels if the Government files a motion for such departure pursuant to an early disposition program authorized by the Attorney General and the United

297. 18 U.S.C. § 3553(e).

298. *Id.* § 3553(f).

299. *See* 2016 U.S.S.G., *supra* note 41, § 4A1.1.

States Attorney.”³⁰⁰ The Commission followed suit, copying the four-level departure from the directive and pasting it into the Guidelines.³⁰¹

This Article adopts, for two reasons, fast-track participation as reason to depart from the 25% bottom limit. First, the downward departure reflects the will of Congress. Second, the fast-track departure is a commonly utilized inducement in illegal reentry cases that promotes judicial efficiency and that particularly eases the strain on sentencing courts in border districts.³⁰²

A sentencing worksheet may include a section on statutory overrides. That separate section may look as follows:

Statutory Overrides

The sentence must comply with the following statutory provisions:

No imprisonment may be imposed on a:

*First-time offender whose instant offense is not
A crime of violence, or an otherwise serious (Grade A) offense*³⁰³

A term of imprisonment must be imposed on an:

*Offender who is convicted of a crime of violence, and
That results in serious bodily injury*³⁰⁴

A term of imprisonment at or near the maximum term authorized shall be imposed upon a career offender.³⁰⁵

Enhanced punishment as specified in 18 U.S.C. § 924(c) (and no probation) shall be imposed on an offender who:

*is convicted of a crime of violence or drug-trafficking offense,
and*

*uses or carries a firearm or who, in furtherance of any such
crime, possesses a firearm*³⁰⁶

A substantial term of imprisonment shall be imposed on an offender who:

*has two or more prior felonies committed separately
committed the instant offense as part of a criminal livelihood*

300. Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675.

301. 2016 U.S.S.G., *supra* note 41, § 5K3.1.

302. U.S. SENTENCING COMM’N, ILLEGAL REENTRY OFFENSES 7 (2015) (“28.9 percent of illegal reentry offenders in fiscal year 2013 received an [early disposition program] departure”).

303. 28 U.S.C. § 994(j) (2012); *see* 18 U.S.C. § 16 (defining “crime of violence”).

304. 28 U.S.C. § 994(j); *see* 18 U.S.C. § 16.

305. 28 U.S.C. § 994(h); *see* 2016 U.S.S.G., *supra* note 41, § 4B1.1(a) (defining “career offender”).

306. 18 U.S.C. § 924(c); *id.* (defining the scope of “drug-trafficking” offense). Terms of imprisonment for offenses shall run consecutively. *Id.* § 924(c)(1)(D)(ii).

played a major role in a conspiracy involving racketeering activity

*committed a crime of violence while on release pending a felony charge for which he was ultimately convicted or trafficked a substantial quantity of a controlled substance*³⁰⁷

A sentence below the statutory minimum is permitted:

Upon government motion for

*The offender's substantial assistance in the investigation or prosecution of another person who has committed an offense*³⁰⁸

A sentence below the statutory minimum is permitted if:

*The offender does not have a prior sentence exceeding sixty days*³⁰⁹

The offender did not use or threaten violence, and did not possess a firearm or dangerous weapon

Death or serious bodily injury did not result

The offender did not play a major role in the offense and was not involved in a continuing criminal conspiracy, and

*The offender cooperated*³¹⁰

A downward departure, for an illegal reentry offense, is permitted:

Upon a government motion if

*The offender participates in an early disposition program*³¹¹

I. Simplicity

Finally, this Article seeks to respond to concerns that the Guidelines are too complex by introducing a more straightforward process and concise manual for those involved in sentencing determinations. In terms of simplicity, the Guidelines have eight chapters and forty-seven parts (not including those that have been deleted or not used), some of which have multiple subparts.³¹² In terms of length, the Guidelines boasts 572 pages, whereas this entire Article stands at less than one-hundred.

V. LIMITS

It is important to acknowledge the limits of this system. First, this Article does not respond to prosecutorial practices that are said to contribute to the severity of federal sentencing and undermine defendants' rights. These

307. 28 U.S.C. § 994(i).

308. 18 U.S.C. § 3553(e).

309. See 2016 U.S.S.G., *supra* note 41, § 4A1.1.

310. 18 U.S.C. § 3553(f).

311. 2016 U.S.S.G., *supra* note 41, § 5K3.1.

312. *Id.* at iii–vi.

practices include, but are not limited to, the “trial penalty,”³¹³ the purported abuse of 28 U.S.C. § 851 to coerce pleas and cooperation,³¹⁴ and stacking counts under 28 U.S.C. § 924(c).³¹⁵ Nor does this Article directly address pleas, despite their increased use and the congressional interest in pleas.³¹⁶ The Commission did not completely respond to plea practices either.³¹⁷ This Article recognizes that the Department of Justice may independently curb prosecutorial discretion insofar as it concerns plea bargaining.³¹⁸

Second, this Article focuses on the sentencing policies that may apply to individual offenders and does not address policies that would govern corporations or organizations. This is an issue that confounded the original Commission,³¹⁹ and that the Commission initially tabled.³²⁰ This Article seeks to address individual sentences in light of the problems with individu-

313. See *United States v. Holloway*, 68 F. Supp. 3d 310, 313 (E.D.N.Y. 2014) (“The difference between the sentencing outcome if a defendant accepts the government’s offer of a plea bargain and the outcome if he insists on his right to trial by jury is sometimes referred to as the ‘trial penalty.’”). As an example, a defendant “likely would have been released in 2003 if he had pled guilty under the agreement offered by the government[, b]ut he went to trial instead, and now his projected release date is March 10, 2045.” *Id.* “Thus, his trial penalty was 42 years in prison.” *Id.* There is an ongoing debate as to whether, in fact, federal defendants, on average, are worse off for declining the plea and proceeding to trial. Compare *id.*, and Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1243 (2015) (reporting, based on study, that “defendants convicted at trial receive sentences that are sixty-four percent longer, on average, than similar defendants who plead guilty to similar crimes”), with David S. Abrams, *Putting the Trial Penalty on Trial*, 51 DUQ. L. REV. 777, 783 (2013) (“[P]lea bargains actually result in longer sentences than trials.”).

314. See *United States v. Kupa*, 976 F. Supp. 2d 417, 419–20 (E.D.N.Y. 2013).

[T]he government abuses its power to file prior felony information in drug trafficking cases. . . . To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate. And to demonstrate to defendants generally that those threats are sincere, prosecutors insist on the imposition of the unjust punishments when the threatened defendants refuse to plead guilty.

Id. (footnotes omitted).

315. See *Holloway*, 68 F. Supp. 3d at 312 (“Section 924(c) counts are a triple threat. First, they carry mandatory sentences, which by definition take a degree of judging out of sentencing. Second, they result in onerous enhancements for ‘second or subsequent [§ 924(c)] conviction[s].’ . . . convictions can occur in the same trial as the first one, as they did here. Third, the mandatory sentences required by § 924(c) are also mandatorily *consecutive*, to one another and to all other sentences in the case.” (alterations in original) (footnote omitted) (citing 18 U.S.C. § 924(c)(7)(c) (2012))).

316. See 28 U.S.C. § 994(a)(2)(E) (2012).

317. 1987 U.S.S.G., *supra* note 9, § 1.8.

318. Memorandum from Attorney Gen. Eric H. Holder, Jr. to All Federal Prosecutors 2 (May 19, 2010), <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf>.

319. See Nagel & Swenson, *supra* note 111, at 211 (describing this area as “thorny”).

320. See *id.* at 212.

al sentencing and the absence of similar concerns with respect to guidelines for organizational offenses.³²¹

Third, this Article expressly does not deal with the issue of multiple counts, which also perplexed the original Commission.³²² Instead, this Article leaves it to counsel to address to what extent multiple counts should affect an offender's sentence. For example, determinations that an offense was part of a single course of conduct, and determinations as to whether a second count doubles the sentence, are to be influenced by counsel and not prescribed here by rule.³²³

Fourth, one may point out that, even if this Article offers a useful alternative to the current Guidelines, federal sentencing policy is but a part of a larger legal scheme concerning crime and punishment. Chief among these statutes are mandatory minimums and maximums.³²⁴ This Article responds to the room established within these statutes. It is true that meaningful criminal justice reform will require congressional action, both in terms of approving any changes to the Guidelines regime and reconsidering the use of mandatory minimums.³²⁵

Fifth, stepping back even further, one may continue that federal sentencing policy is but a part of a much larger social sequence that consists of failures in family and community support, educational resources, employment opportunity, and substance abuse and mental health services, and only ends with sentencing. This Article addresses only the sentencing stage, and not the other elements that may lead an individual to interact with the criminal justice system. To attain a just society, each of the phases prior to sentencing must be tackled.

VI. APPLYING THE ALTERNATIVE SYSTEM

To determine if this proposed alternative system is workable—that is to say one that can be administered with some ease and measure of predictability—this Article provides broad sketches of how the system would apply to four cases. Some may criticize these simulations and insist instead that this Article's proposed framework be provided to federal judges to apply to hypothetical cases. This indeed was the approach taken in the semi-

321. *See id.* at 213–14.

322. *See* Breyer, *supra* note 54, at 25–26 (describing the multiple count problem as “intractable” and “complex”).

323. The Guidelines' approach to grouping multiple counts may be instructive to counsel and the courts, *see* 2016 U.S.S.G., but is not mandated herein. *See supra* note 41, § 3D1.2–3.

324. A list of mandatory minimum statutes may be found here: CHARLES DOYLE, CONG. RESEARCH SERV., FEDERAL MANDATORY MINIMUM SENTENCING STATUTES 101–16 (2013).

325. *See* Obama, *supra* note 79, at 826 (“Any lasting, broad-based reform to federal sentencing can only be addressed through legislation.”).

nal 1974 Second Circuit Sentencing Study that helped make the case for federal sentencing reform.³²⁶

The author gave serious consideration to recreating this Second Circuit Study by giving this Article's model to federal judges. But two points counseled against this option. First, any such experiment would be critically incomplete. In asking federal judges to divulge what sentence they would impose in the hypothetical cases, the judges would be supplied only with a summary of the facts of a case. Left out would be essential parts of the sentencing process, such as counsel arguments and colloquies with the offender. The Second Circuit Study acknowledged this "paper defendant" shortcoming and the role that additional information may have on a judge imposing an individualized sentence.³²⁷

The second problem, however, convinced the author that involving actual judges was not prudent. In particular, the fact remains that judges have considerable responsibilities, including sentencing real defendants in actual cases. To generate statistically significant results, at least twenty federal judges would have to participate in this experiment. This means that the author would be drawing away the time of a significant number of federal judges—this imposition, in the aggregate, is not something that the author felt was sufficiently justified, as the hypothetical sentences would bear little resemblance to actual sentencing and there are other ways to demonstrate how this model works.

This Article instead utilizes an approach used by an American Bar Association task force to show how its proposed fraud guideline applies.³²⁸ The task force presented four fact patterns and then walked the reader through how the proposed guideline would apply to the four vignettes. This approach has been successful in that the task force's "shadow guidelines" have informed sentences in federal cases,³²⁹ and the Commission itself was forced to confront that model as a consequence.³³⁰ As the ABA's four cases were sufficient to have a meaningful impact on actual cases and on the Commission's deliberations, Part IV.A explains how this Article's model works in four cases. Part IV.B suggests that the Commission should be authorized to adjust the midpoint of sentences in light of the gap between the

326. Second Circuit Sentencing Study, *supra* note 24, at 2.

327. *Id.* at 14–16.

328. See A REPORT ON BEHALF OF THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION TASK FORCE ON THE REFORM OF FEDERAL SENTENCING FOR ECONOMIC CRIMES (2014), https://www.americanbar.org/content/dam/aba/publications/criminaljustice/economic_crimes.auth_checkdam.pdf.

329. See, e.g., *United States v. Faibish*, No. 12-cr-265, slip op. at 6 (E.D.N.Y. July 16, 2015).

330. See *The New York Law Journal Publishes Editorial by Chair Saris*, U.S. SENTENCING COMM'N (Apr. 15, 2016), <http://www.ussc.gov/about/news/press-releases/april-14-2016>.

sentences dictated by this system and sentences currently imposed by federal judges.

A. Application

The four cases that are the subject of this demonstration are the four consolidated cases decided by the United States Court of Appeals for the Seventh Circuit in a 2015 opinion authored by Judge Posner.³³¹ In a 2016 book, Judge Posner elaborated on these cases in discussing the Sentencing Guidelines and his concerns with supervised release.³³² Why use these cases? The reasons are several. Most importantly, these are actual cases in which a real defendant was convicted and sentenced. Relatedly, employing these cases also obviates the need for any hypothetical cases to be invented. Moreover, these cases touch various major offense types. In addition, they are unusual in that four separate appeals were consolidated, and thus, considered together to yield a single opinion. Thus, there is a continuity of consideration and analysis that would not otherwise be present in four separate, independently examined sentencing determinations. Finally, as these cases were the subject of an academic book authored by a leading appellate judge, the cases already have leapt out of the courtroom into the public realm.

Below is a factual summary of the cases, and an overview of the sentencing determinations under the proposed guideline system.

1. United States v. Thompson

Factual Overview:

When David Michael Thompson was twenty-three years old, he began an online relationship with L.C., then a fourteen-year-old girl.³³³ The two engaged in a sexually explicit online relationship.³³⁴ In particular, L.C. sent Thompson pictures of her breasts and vagina, he returned pictures of his penis, and she masturbated naked while on a video chat with him.³³⁵ Subsequently, when L.C. was sixteen years of age, Thompson drove from California to Ohio to pick up L.C., and planned to drive back to California where they both would live.³³⁶ After Thompson picked up L.C., the two

331. *United States v. Thompson*, 777 F.3d 368 (7th Cir. 2015).

332. RICHARD A. POSNER, *DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY* 197 (1st ed. 2016).

333. *Thompson*, 777 F.3d at 375.

334. *Id.*

335. See Brief & Required Short Appendix of Defendant-Appellant David M. Thompson at 3, *Thompson*, 777 F.3d 368 (No. 14-1316).

336. Stipulation of Facts at 1, *United States v. Thompson*, No. 3: 12-CR-30316 (S.D. Ill. Oct. 18, 2013).

spent the night at Thompson's relative's home in Indiana.³³⁷ While there, Thompson and L.C. engaged in sexual intercourse,³³⁸ which was legal in light of Indiana's consent age of sixteen.³³⁹ After the two had resumed their travel to California, Thompson was pulled over by the Illinois State Police.³⁴⁰ Thompson had with him an iPhone 5 that stored two sexually explicit pictures of L.C.³⁴¹

Sentence Under the Guidelines:

Thompson was charged with Transportation of Child Pornography in violation of 18 U.S.C. § 2252A(a)(1).³⁴² Thompson pled guilty to this charge, and with a criminal history category of II, the judge determined that the Guidelines range was 188–235 months.³⁴³ Thompson was sentenced to imprisonment for 210 months.³⁴⁴

Sentencing Under the Article's Model:

Offense of Conviction: 18 U.S.C. § 2252A(a)(1)

Grade of the Offense: C

Statutory Range: 10–25 years for Class C felonies. Under the statute of conviction, however, the statutory minimum is 5 years and the statutory maximum is 20 years. Accordingly, the relevant statutory range is 5–20 years, or 60 to 240 months.

Midpoint of the Applicable Statutory Range: 150 months

25% range: 131–169 months

At this stage, counsel will argue, and the sentencing judge will consider, the applicability and weight of the aggravating and mitigating factors from the list provided in this Article. A positive attribute of this model is that the parties will have more of an opportunity to influence sentencing by addressing the relevance and meaning of the factors. Accordingly, it is not possible to pinpoint, as with the Guidelines, exactly what the sentence will look like; this is not a bug in the model, but an intentional feature of it. That said, counsel should be able to forecast, from their understanding of the case, which aggravating and mitigating factors may be in play.

The district court judge sentenced the defendant to 210 months, just around the midpoint of the applicable Guidelines range of 188–235 months.

337. *Id.* at 2.

338. *Id.*; Statement of Facts at 1, *United States v. Thompson*, No. 13-CR-008 (S.D. Ohio Nov. 20, 2013).

339. *Thompson*, 777 F.3d at 375.

340. Stipulation of Facts, *supra* note 336, at 1–2.

341. *Id.* at 2.

342. Indictment at 1, *Thompson*, No. 12-CR-30316 (S.D. Ill. Nov. 16, 2012).

343. See Brief & Required Short Appendix of Defendant-Appellant David M. Thompson, *supra* note 335, at 7.

344. Judgment at 2, *Thompson*, No. 12-CR-30316-MJR (S.D. Ill. Jan. 31, 2014).

If a district court judge sentenced the defendant to the midpoint of the range under this Article's proposed system, a sentence of 150 months would be appropriate—five years less than the sentence to be imposed under the current Guidelines. This may be a welcomed result, given significant concerns that the child pornography guidelines are excessive.³⁴⁵ This is not to suggest that this model adequately addresses the severity concerns with child pornography sentencing, but that the model could be a step in the right direction.

2. *United States v. Ortiz*

Factual Overview:

Armed with a BB gun, Derek Ortiz robbed a bank of \$2,880.³⁴⁶ A month later, again armed with a BB gun, Ortiz robbed a different bank of \$2,615.³⁴⁷ Soon thereafter, Ortiz robbed yet a third bank, accompanied by his weapon of choice, this time taking \$3,590.³⁴⁸ During the final robbery, Ortiz attempted to flee and struck a police vehicle that was in pursuit.³⁴⁹ Ortiz made out on foot, but was subsequently apprehended and arrested.³⁵⁰ Ortiz was charged with three counts of bank robbery in violation of 18 U.S.C. § 2113(a).³⁵¹

Sentence Under the Guidelines:

Ortiz pled guilty to all three counts.³⁵² Ortiz stipulated that he committed four bank robberies in addition to those charged in the indictment.³⁵³ The district court determined that the applicable guidelines range was 108–

345. See U.S. SENTENCING COMM'N, UNITED STATES SENTENCING COMMISSION'S 2016 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.28 (2016), <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2016/Table28.pdf> (noting that 713 out of 1,591 sentences under the child pornography guideline were below-guideline sentences); see also *United States v. Cruikshank*, 667 F. Supp. 2d 697, 703 (S.D. W. Va. 2009) ("Possessors of child pornography are modern-day untouchables. . . . [S]ociety seeks harsh sentences for anyone who participates in this market. . . . The resulting punishment under the Guidelines may be . . . a reflection of our visceral reaction to these images . . .").

346. Brief & Required Short Appendix of Defendant-Appellant Derek Ortiz at 3–4, *United States v. Ortiz*, No. 14-1521 (7th Cir. Aug. 14, 2014).

347. *Id.* at 3.

348. *Id.*

349. *Id.*

350. *Id.*; see also Brief of the U.S. at 3, *Ortiz*, No. 14-1521 (7th Cir. Oct. 7, 2014).

351. Indictment, *United States v. Ortiz*, No. 10-CR-00187 (N.D. Ill. Mar. 18, 2010). Ortiz committed similar bank robberies on January 15, 2010, February 4, 2010, February 11, 2010, and February 15, 2010, but was only indicted on the January 27, 2010, February 27, 2010, and March 5, 2010 robberies. Brief & Required Appendix of Defendant-Appellant Derek Ortiz, *supra* note 346, at 3–4; Brief of the U.S., *supra* note 331, at 3–5.

352. Judgment at 1, *Ortiz*, No. 10-CR-00187 (N.D. Ill. Mar. 4, 2014).

353. Brief of the U.S. at 2, *United States v. Ortiz*, No. 15-3240 (7th Cir. Mar. 3, 2016).

135 months' imprisonment.³⁵⁴ He was sentenced to imprisonment for 135 months for each count, to run concurrently.

Sentencing Under the Article's Model:

Offense of Conviction: 18 U.S.C. § 2113(a)

Grade of the Offense: C

Statutory Range: 10–25 years for Class C felonies. Under the statute of conviction, however, the statutory maximum is set at 20 years. Accordingly, the relevant statutory range is 10–20 years, or 120–240 months.

Midpoint of the Applicable Statutory Range: 180 months

25% Range: 157–203 months

Again, counsel will then invoke the limited universe of enumerated aggravating and mitigating factors to argue where, within this range, the sentence should fall, or to argue that the case is atypical and thus the sentence should fall outside of the specified range. As the district court judge imposed a sentence at the high-end of the Guidelines, a judge going to the high-end of this Article's proposed system would impose a sentence of 203 months—a significant increase relative to the imposed sentence of 135 months.

3. *United States v. Bates*

Factual Overview:

Over the course of several phone calls, Charles Bates and Edward Parker arranged to meet at a residence, where Parker would deliver cocaine to Bates.³⁵⁵ Bates subsequently pulled up to the agreed-upon residence in his vehicle, Parker then entered the front seat of Bates' vehicle and handed Bates crack cocaine.³⁵⁶ Bates was charged with two counts of intentional possession with intent to distribute twenty-eight grams or more of cocaine in violation of 21 U.S.C. § 841(a)(1), and two counts of using a communication device to facilitate the commission of a felony in violation of 21 U.S.C. § 843(b).³⁵⁷ Bates pled guilty to one count of possession with intent to distribute twenty-eight grams or more of cocaine base, with the remaining counts dismissed.³⁵⁸

Sentence Under the Guidelines:

354. *Id.* at 4.

355. Government's Sentencing Memorandum at 1–2, *United States v. Bates*, No. 12-CR-00700 (N.D. Ill. Mar. 13, 2014).

356. *Id.* at 2.

357. Indictment, *Bates*, No. 12-CR-00700 (N.D. Ill. Sept. 6, 2012).

358. Judgment at 1, *Bates*, No. 12-CR-00700 (N.D. Ill. Mar. 20, 2014).

As Bates was subject to the career offender enhancement and as he also accepted responsibility, his Guidelines' range was 262–327 months.³⁵⁹ Bates received a below-Guidelines sentence of 188 months of imprisonment.³⁶⁰ Defense counsel had “stressed defendant’s history of substance abuse, arguing that it had contributed substantially to defendant’s instant and prior crimes, and also argued that application of the career offender guideline overstated the seriousness of his past criminal conduct.”³⁶¹

Sentencing Under the Article’s Model:

Offense of Conviction: 21 U.S.C. § 841(a)(1)

Grade of the Offense: B

Statutory Range: 25–61 years. Under 21 U.S.C. § 841(b)(1)(B), however, the statutory minimum penalty is set at 5 years and the statutory maximum is set at 40 years. Accordingly, the relevant statutory range is 5–40 years, or 60 to 480 months.

Midpoint of the Applicable Statutory Range: 210 months

25% Range: 184–236 months

Again, counsel will invoke the limited universe of enumerated aggravating and mitigating factors to argue where, within this range, the sentence should fall, or to argue that the case is atypical and thus the sentence should fall outside of the specified range. Here, the Guidelines' range was 262–327 months and the range under the proposed model is 184–236 months. The district court judge felt the need to impose a below-Guidelines sentence of 188 months in light of mitigating circumstances. A sentence of 188 months would fall within the range of the proposed model and would be at the low end of the range, thus reflecting the mitigating circumstances recognized by the judge.

4. *United States v. Blount*

Factual Overview:

Between March 2010 and June 2011, Domingo Blount, with the assistance of several other individuals, ran a heroin distribution organization that operated in Illinois and Ohio.³⁶² Through this operation, Blount and others distributed multi-kilogram quantities of heroin in Chicago and Cincinnati.³⁶³

359. Brief & Required Short Appendix of Defendant-Appellant Charles Bates at 4–5, *United States v. Bates*, No. 14-1676 (7th Cir. July 25, 2014); Brief of the U.S. at 4, *Bates*, No. 14-1676 (7th Cir. Oct. 3, 2014).

360. Brief & Required Short Appendix of Defendant-Appellant Charles Bates, *supra* note 359, at 7.

361. Brief of the U.S., *supra* note 359, at 4–5.

362. Brief & Required Short Appendix of Defendant-Appellant Domingo Blount at 3–4, *United States v. Blount*, No. 14-1772 (7th Cir. Aug. 1, 2014).

363. *Id.*

To do so, Blount worked with brokers to purchase the heroin, and then worked with mid-level distributors to resell the heroin to others.³⁶⁴ Blount also arranged for others to act as couriers, security, or lookouts in an effort to avert law enforcement detection.³⁶⁵ On one occasion, at Blount's direction, co-conspirators negotiated a drug deal with, and delivered heroin to, an individual who turned out to be an undercover officer.³⁶⁶

Blount was charged with one count of conspiring to possess with intent to distribute heroin in violation of 21 U.S.C. § 846; three counts of possession of at least one kilogram of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1); and three counts of unlawful use of a communication facility in violation of 21 U.S.C. § 843(b).³⁶⁷ Blount pled guilty to all counts.³⁶⁸

Sentence Under the Guidelines:

Blount was determined to have trafficked at least ten kilograms, but no more than thirty kilograms, of heroin.³⁶⁹ In addition, he exercised a leadership role over at least one other participant in the conspiracy.³⁷⁰ Blount did accept responsibility.³⁷¹ Blount's past put him in criminal history category IV.³⁷² In view of the above, the district court calculated Blount's Guidelines range as 360 months to life.³⁷³ Blount was sentenced to 300 months of imprisonment for each of the conspiracy and possession with intent to distribute offenses, to run concurrently.³⁷⁴ In addition, Blount was sentenced to 96 months of imprisonment for each of the unlawful communication offenses, also to run concurrently to each other and the 300-month terms.³⁷⁵

Sentencing Under the Article's Model:

Offenses of Conviction: 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), 21 U.S.C. § 843(b).

Grades of the Offenses: A (21 U.S.C. § 841(a)(1)), E (21 U.S.C. § 843(b))

Statutory Ranges: The statutory penalty for an A-class felony is life in prison. 21 U.S.C. § 841(b)(1)(A) specifies, however, that the range for vio-

364. *Id.*

365. *Id.*

366. Brief of the U.S. at 4, *Blount*, No. 14-1772 (7th Cir. Oct. 6, 2014).

367. Indictment at 1-4, 10-11, 23, 25, 28-29, *United States v. Blount*, No. 11-CR-00415 (N.D. Ill. Sept. 20, 2011).

368. Judgment at 1, *Blount*, No. 11-CR-00415 (N.D. Ill. Apr. 2, 2014).

369. Brief of the U.S., *supra* note 366, at 5.

370. *Id.* at 6.

371. *Id.* at 8.

372. *See id.* at 5-6.

373. *Id.* at 8.

374. Judgment, *supra* note 368, at 2.

375. *Id.*

lations of the statute shall be 10 years to life. The low-end of the range is 10 years and the high-end of life, under this Article's reference, to life expectancy means 61 years.³⁷⁶ The effective range, therefore, is 10–61 years, or 120 to 732 months. The statutory penalty for an E-class felony is 1–5 years. 21 U.S.C. § 843(b) specifies, however, that the statutory maximum penalty for a violation of this provision shall be no more than 4 years. Accordingly, the applicable range is 1–4 years, or 24 or 48 months. Assuming, as with the actual sentence imposed, that the penalties are to run concurrently for each count, and that the penalties are to run concurrently for each statute of conviction, the relevant statutory range is 120 to 732 months.

Midpoint of the Applicable Statutory Range: 426 months.

25% Range: 373–479 months

Counsel will invoke the limited universe of enumerated aggravating and mitigating factors to argue where, within this range, the sentence should fall, or to argue that the case is atypical and thus the sentence should fall outside of the specified range. Here, the actual statutory range of 360 months to life under the Guidelines is similar to the statutory range of 373–479 months under the proposed model. The heartland, in either case, would dictate a substantial sentence. The high sentencing range should come as no surprise given Congress's clear indication, reflected in the Class A felony ranking, that drug trafficking is a serious offense.

B. Adjustments to the Midpoint

It bears emphasis that the final sentences imposed under the proposed model would be influenced by the parties' arguments concerning any of the enumerated aggravating and mitigating circumstances. With this important caveat in mind, the first two cases reveal sharp differences between the sentences imposed under the Guidelines and sentences that would be within the range of typical under the proposed model. For the third case, the proposed model arguably does a better job of getting closer to the below-Guidelines sentence imposed by the district court judge. For the last case, the sentences seem to be close, at least prior to the point of the parties' arguments.

The key qualitative differences between the current system and the proposed one is not only that the starting point for the penalties would be the seriousness of the offense as determined by the will of Congress (as opposed to average past practice of the courts), but also the manner in which the sentence will be rehabilitative in nature (as opposed to punitive in nature). In other words, a simplistic appraisal of the proposed model—that is, it may arrive at roughly the same sentence as the current system—misses

376. *See supra* note 209.

the mark of how this system arrives at that sentence and how that sentence is to be carried out.

The point of the four hypotheticals is to demonstrate that the system has these benefits—a principled source and a pragmatic method of execution—and also to demonstrate that the model may be applied with relative ease. The statutory grade of the offense helps place the parties and the judge in the general ballpark of the sentence, and the sentence can be made proportional based on arguments made by the parties as to a fixed universe of factors.

The Sentencing Guidelines were designed to be fluid, and the Sentencing Commission was designed to monitor developments and be responsible for the ultimate evolution of the Guidelines. In the same spirit, the guidelines proposed herein are not static, but can be improved over time by the experts on the Commission.

The original Commission understood that buy-in from the judges was critical to the success of any effort to regulate judicial discretion.³⁷⁷ Accordingly, the Commission grounded penalty levels in what judges already were doing.³⁷⁸ While this model does not anchor the midpoint of sentences to judicial past practice, the model nonetheless must be responsive to potential judicial reactions. To minimize the gap between current sentences and a grade-based sentencing system, and to soften thereby any judicial hostility to this new system, the Commission should adjust the midpoint in consideration of past practice. For example, if the Commission studied sentencing data and determined that judges were imposing sentences well below the ranges proposed herein, the Commission could slash the midpoint, by moving it from the average of the applicable statutory minimum and maximum to a lower point between the statutory minimum and maximum.³⁷⁹ Doing so would bring this model's sentences in closer alignment with current sentences. In short, this model is not only administrable, but also viable, as the Commission may adjust the relevant midpoint in consideration of judicial behavior.

377. See Paul H. Robinson, *The Federal Sentencing Guidelines: Ten Years Later*, 91 NW. U. L. REV. 1231, 1241–42 (1997).

378. See *id.*

379. This authorization is consistent with what a sentencing expert once suggested in conversation with the Author on how to improve the Guidelines: to include a chapter at the end of the Guidelines Manual that says, in effect, “divide the Guidelines range from the prior chapters by half.”

VII. CONCLUSION

Justice Ruth Bader Ginsburg has likened the law to a pendulum.³⁸⁰ This conception of the law is particularly apt in the context of federal sentencing. In 1984, Congress responded to unstructured sentencing and the consequent disparities by erecting a rigid guidelines system. Twelve years after *Booker*, two things are clear: the status quo in federal sentencing is not sustainable, and that more than marginal adjustments to the Guidelines are in order. This Article offers support for an alternative federal sentencing system that relies on factors and not figures, and that coordinates and gives meaning to each of the purposes of punishment, elevating the role of rehabilitation in sentencing and requiring release to be premised on offender readiness and not what a judge fixed as the release date perhaps years ago. This model, if adopted, would swing federal sentencing towards the simplified, reasoned, and just ends of the spectrum.

380. *Justice Ruth Bader Ginsburg Remarks*, C-SPAN (Feb. 4, 2015), <https://www.c-span.org/video/?324177-1/discussion-supreme-court-justice-ruth-bader-ginsburg> (“The true symbol of the United States is not the bald eagle, it is the pendulum. When it swings too far one way, it’s going to go back in the other direction.”).